(1)

Supreme Court, U.S.
FILED
051414 MAR 3 - 2006
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

TYRONE A. BYRD
Petitioner,

vs.

TRAVIS FLENNIKEN: SOUTHEAST COMMUNITY CAPITAL CORPORATION: TECHNOLOGY 2020 CORPORATION
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For national interest of citizens, we are requesting the Supreme Court to clarify whether corporate lenders, of loans guaranteed by the SBA, should be classed as state actors. Also, requesting the court to clarify what rights plaintiffs should be granted, by U.S. District Courts.

1. Is there a conflict of decision, between Flagg Bros., Inc. v. Brooks 436 U.S. 149 and Burton v. Wilmington Parking Authority, 365 U.S. 715, S. Ct. 856, 6L ED. 20 45 (1961), in the Sixth Circuit Court's determining a state actor in this case?

2. Is a non-profit corporation, for public benefit, that is an approved intermediary lender of the Small Business Administration (SBA), a state actor?

3. Should a claim be dismissed, on a Rule 12(b)(6) motion of FRCP, without the Plaintiff being given the opportunity to prove such claim?

4. Should a United States District Court allow a Plaintiff to complete discovery, after such Court has granted In Part and Denied In Part a Rule 12 (b)(6) Defendant's motion to dismiss?

LIST OF PARTIES

1. Tyrone A. Byrd a private United States citizen resident of Lakeland, Shelby County, Tennessee representing self.

2. Travis Flenniken, Southeast Community Capital Corporation and Technology 2020 Corporation.

Corporate Disclosure

Travis Flenniken is a loan officer employed by Southeast Community Capital Corporation, which is wholly owned by Technology 2020 Corporation. Both corporations are under the Tennessee Nonprofit Corporation Act.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix 1a; order from The Sixth Circuit Court Of Appeals affirming the district court's judgment to the petition is unpublished.

The opinion of the United States district court appears at Appendix 15a; order from The United States Western District Court granting in part and denying in part defendants' motion to dismiss, Appendix 27a; order denying plaintiff's motion for extension of time to complete discovery and to file responsive pleadings to defendants' motion for summary judgment and to show cause why summary judgment should not be granted and Appendix 31a; order denying plaintiff's motion to vacate order granting defendants' motion to stay discovery to the petition and is unpublished.

JURISDICTION

For cases from **federal courts:**

The date on which the United States Court of Appeals for the Sixth Circuit decided my case was October 4, 2005.

A timely petition for rehearing was denied by the United States Court of Appeals for the Sixth Circuit on December 5, 2005 and a copy of the order denying rehearing appears at Appendix 44a; with sitting judges; The Honorable David A. Nelson and The Honorable Jeffrey F. Sutton of the Sixth Circuit Court, and The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Constitution of the United States Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are Citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC § 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner Tyrone A. Byrd, on March 10, 2003, went to a municipally owned office building located at 555 Beale Avenue, Memphis, Tennessee, where Defendants Travis Flenniken, a loan officer, employed by Defendant Southeast Community Capital Corporation, which is by wholly owned by Defendant Technology 2020 Corporation, both are corporations under the Tennessee Non-profit Corporation Act, and are for public benefit, (see app. 24a, & 26a), were leasing office space from the city of Memphis, Tennessee and administering, as intermediary lenders for the Small Business Administration (SBA), over a loan program that was composed, in part, of Tax-payers' funds supplied by the SBA.

The Defendant Flenniken refused to allow Byrd to **apply** for two business loans, and due process, stating his reason for such refusal was that Petitioner Byrd and son Preston Byrd, who was present, were related.

On June 2, 2003, Petitioner Byrd, pro se, filed a civil complaint, in the Circuit Court at Memphis, Tennessee, naming Defendants Travis Flenniken, Southeast Community Capital Corporation and Technology 2020 Corporation. The complaint was removed, by counsel for the Defendants, to the United States Western District Court of Tennessee Western Division.

After several motions were filed, an amend complaint, in part claiming violation of the Fourteenth Amendment and 42 USC § 1983 due process, along with other claims, were filed by Byrd. The District Court, on March 22, 2004, dismissed Byrd's § 1983 due process claim on a Rule 12 (b)(6) FRCP motion to dismiss filed by the Defendants. (see appendix 15a) The dismissal order left pending a 15 USC § 1691 and a § 2000d, Title VI 1964 civil

rights act claim, filed in Byrd's amend complaint; *(see appendix 17a)* also left pending were affidavits filed by the Defendants, a motion for summary judgment filed by the Defendants and a motion of Plaintiff, filed on March 1, 2004, for an extension of time to complete discovery, such as to depose affiants and other discovery, and to file responsive pleadings to defendants' motion for summary judgment. *(see app. 51a, 72a, 78a, 80a, 32a)*

The District Court, on June 15, 2004, issued an order denying Plaintiff's motion for extension of time to complete discovery and to file responsive pleadings to defendants' motion for summary judgment and to show cause why summary judgment should not be granted and an order denying plaintiffs' motion to vacate order granting defendants' motion to stay discovery. *(see app. 27a, 31a)* These orders prejudice plaintiff Byrd's position to defend the defendants' motion for summary judgment and forced Byrd to file a cross motion for summary judgment that was lacking certain evidence to support the motion.

The District Court, on September 16, 2004, issued an order granting defendants' motion for summary judgment, denying plaintiffs' motion for summary judgment, and dismissing case with prejudice. A final judgment dismissing case was rendered on September 22, 2004. A notice of Appeal was filed that same day, by Byrd, to the United States Sixth Circuit Court of Appeals.

On October 4, 2005, the Sixth Circuit Appellate Court issued an order affirming the District Court's judgment. On November 8, 2005, Byrd was granted, an extension of time to file a petition to rehear that was denied on December 5, 2005. This case, in pursuant to 28 U.S.C. § 1254 (1), is now ripe before this Honorable United States Supreme Court seeking the granting of a writ of certiorari.

Argument

In the Sixth Circuit Court's order issued October 4, 2005, there is a conflict of United States Supreme Court decisions. *(see appendix 3a)* The Sixth Circuit has cited Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155-57 (1978) *(see appendix 45a)* in determining whether Byrd was deprived of a right or interest secured by the Constitution or the laws of the United States and also in the determining whether the Defendants are state actors in order to establish a cause of action under § 1983. Flagg is in conflict with Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), which is more applicable in this case in the determining an interest secured by the Constitution and determining whether the Defendants are state actors.
In Adams v. Vandermark 855 F. 2d 312, at page 314, (4) *(see appendix 46a)*

> "The Supreme Court has used several theories, or tests, to determine whether an action was taken under color of state law or amounted to state action. The test most relevant to this case is the "symbiotic relationship" test, which the Supreme Court established in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)."

In the Defendant Southeast Community Capital Corporation's, president Clint Gwen's sworn affidavit, a letter from a Small Business Administration office legal counsel at Nashville, Tennessee and a fact sheet from SCC, have affirmed and admitted that they are licensed by the SBA and are intermediary lenders on behalf of the SBA, a United States Government entity. *(see appendix 73a, 83a, 85a)*

Using the "symbiotic relationship" test, the defendants loaning money issued to them from the SBA are acting as the SBA and are state actors as required to establish a claim under 42 USC § 1983.

In Burton a restaurant was located in a municipally owned parking garage; defendants Flenniken, SCC and Technology 2020 office is located at 555 Beale Avenue, Memphis, Tennessee, which is a city of Memphis owned office building. *(see appendix 88a)*

In Burton, a black man was refused the right to be served at the restaurant; Petitioner Byrd is a Black man that was deprived by the defendants, the right to apply for Taxpayers' dollars issued from the SBA; also deprived of the Fourteenth Amendment right of liberty or freedom to fill out a loan application and due process procedure of qualification or disqualification for money or property made available by the United States Citizen Tax payers through the SBA.

In Burton the parking garage and therefore the city profited from the discrimination; symbiotic, as in Burton, the 555 Beale Avenue office building and the city of Memphis profited from the defendants' leasing the office space thereof.

Symbiotic, as in Burton, the defendants refusal to allow Petitioner Byrd the liberty or freedom to apply for money or property made available, by United States Tax payers, abridged Byrd's rights under the Equal Protection Clause of the Fourteenth Amendment.

In Burton "the state has so far insinuated itself into a position of interdependence with the restaurant that it must be recognized as joint participant in the challenged activity," and thus the restaurant's discrimination was state action. *Id at 725, 81 S. Ct. at 862.*

Symbiotic, as in Burton, the SBA, a United States government entity, licensing the defendants Flenniken,

SCC and Technology 2020 as intermediary lenders and supplying them with United States Tax payers' dollars, to loan on behalf of the SBA, has so for insinuated itself into a position of interdependence with the defendants, that the defendants must be recognized as joint participants with the SBA and thus are state actors as required to establish a 42 USC § 1983 claim and are in violation of depriving Byrd the liberty of due process under the Fourteenth Amendment and 42 USC § 1983.

The Defendants never filed an answer to Byrd's original complaint, but on August 25, 2003, they filed a Rule 12 (b)(6) motion to dismiss, stating Byrd failed to state a claim. The District Court allowed Byrd to amend the original complaint, which was amend, on October 6, 2003, stating claims under 42 USC § 1983 due process, 15 USC § 1691(a)(1) racial discrimination, 42 USC § 2000d, Title VI of the 1964 Civil Rights Act and two state claims. The defendants answered the amend complaint and filed a motion for summary judgment attached by several affidavits from the defendants.

On March 22, 2004, which was eight months after the defendants filed the Rule 12(b)(6) motion to dismiss, the District Court rendered a decision on the Rule 12(b)(6) motion to dismiss, Granting In Part And Denying In Part Defendants' Motion To Dismiss. *(see appendix 6a)* This order dismissed Byrd's due process claim without a hearing or the opportunity to prove claim.

In the case of, Hughes v. Rowe et. al., 449 U.S. at 5 , *(see appendix 47a)* the Supreme Court cited;

> "dismissed for failure to state a claim-even under the controlling principle that a prisoner's complaint prepared without counsel should not be dismissed unless it appears beyond doubt that he can prove no set of facts entitling him

> to relief nevertheless the complaint was adequate at least to require some response from respondents, by way of affidavit or otherwise, to petitioner claim that his initial confinement to segregation violated due process because it occurred without a prior hearing,"

Buchanan v. Apel, 249 F. 3d. 485, 488 (6th Cir. 2001), *(see appendix 48a)* quoting Conley v. Gibson, 355 U.S. 41, 45, 46, 78 S. Ct. 99 2L. Ed. 2d. 80 (1957). *(see appendix 48a)* Lewis v. ACB Business Services, Inc. 135 F. 3d 389 (6th Cir. 1998), *(see appendix 50a)*

The District Court's on March 22, 2004, issued and order Granting In Part and Denying In Part Defendants' Motion To Dismiss, *(see appendix 15a)*, allowing Byrd's claims of 15 USC § 1691(a)(1) racial discrimination and 42 USC § 2000d, Title VI of the 1964 Civil Rights Act, as part of the amend complaint. *(see appendix 17a)* Byrd had pending a motion to vacate order granting Defendants' motion to stay discovery and a motion of Plaintiff for extension of time to complete discovery and to file responsive pleadings to Defendants' motion for summary judgment; with attached memorandum, which was filed on March 1, 2004. *(see appendix 32a, 34a)* The District Court, on June 15, 2004, issued an order denying Byrd's motion.

The Sixth Circuit Court of Appeals affirmed the District Court's order of denial in it's October 4, 2005 stating as following: "the district court did not abuse its discretion in staying discovery until it could rule upon the defendant's motion to dismiss." *(see appendix 5a last para)* This point is well taken considering the District Court's order Granting In Part and Denying In Part Defendants' Motion To Dismiss had been issued. (see app. 15a) Being so the District Court should have,

after issuing said order, granted Byrd the right to discovery whereas there was a pending Defendants' Motion for Summary Judgment, attached with affidavits; depositions taken and other discovery should have been granted. Celotex corporation v. Myrtle Nell Cartrett, 477 U.S. 316 at 316. (see appendix 49a)

> "The Supreme Court, Justice Rehnquist, held that: (1) Rule 56(c) mandates the entry of summary judgment after adequate time for discovery against a party who fails to make showing sufficient to establish the existence as to which that party will hear the burden of proof at trial:"

Jack Anderson et. al. v. Liberty Lobby, Inc. and Willis A. Carlo, 477 U.S. 242, *(see appendix 50a)*

> "Plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment, even where the evidence is likely to be within the possession of the defendant, as long as plaintiff has had a full opportunity to conduct discovery."

Whereas claims are pending, and a motion for summary judgment attached with affidavits are pending, every plaintiff should be granted the right to discovery.

REASONS FOR GRANTING THE PETITION

1. There is a conflict of decision in the Sixth Circuit Court of Appeals decision, in its October 4, 2005 order citing the case of Flagg Bros. v. Brooks in determining the deprivation of a right or interest secured by the Constitution or the laws of the United States and determining the defendants as being state actors. In this case, before this Honorable Court, Burton v. Wilmington Parking Authority, is more applicable in making any such determinations.

2. The Fourteenth Amendment of The United States Constitution states the following: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life; liberty, or property without due process of law."

Any Corporation, or its employees, in the United States that is an intermediary lender of the Small Business Administration should not have the lawful right to deprive United States citizens the liberty or freedom to apply for Tax payer's dollars without due process of qualifying or disqualifying such citizens.

3. No corporation or its employees, in the United States, being a state actor is exempted from the laws of the United States such as 42 USC § 1983 which state:

> "Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

For all of the above foregoing lawful reasons, this petition should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/ s / Tyrone A. Byrd

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Date: April 27, 2006

IN THE
SUPREME COURT OF THE UNITED STATES

TYRONE A. BYRD – PETITIONER

VS.

TRAVIS FLENNIKEN: SOUTHEAST COMMUNITY CAPITAL CORPORATION – TECHNOLOGY 2020 CORPORATION – RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER AND RESPONDENTS JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 04 – 6153	)	
	)	
TYRONE A. BYRD,	)	
	)	
V.	)	ORDER
	)	
TRAVIS FLENNIKEN; SOUTHEAST COM – MUNITY CAPITAL CORPORATION; TECHNOLOGY 2020,	)	OCTOBER 4, 2005

Before: NELSON and SUTTON, Circuit Judges: ZATKOFF, District Judge.

Tyrone A. Byrd, a pro se Tennessee resident, appeals a district court judgment dismissing his civil rights action filed pursuant to 15 U.S.C. § 1691; 42 U.S.C. §§ 1983, 2000d; and Tenn. Code Ann. § 48 –58 – 503 et seq. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary relief, Byrd sued Travis Flenniken, Technology 2020 and Southeast Community Capital (SCC) regarding his attempt to

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*The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

secure business loans. The district court subsequently granted summary judgment to the defendants.

On appeal, Byrd argues that: 1) the defendants were state actors as required by § 1983: 2) the district court abused its discretion in dismissing his due process claim; 3) the district court abused its discretion in denying him the ability to complete discovery; and 4) the district court erred in dismissing his racial discrimination claim.

The district court's order is reviewed de novo. *See Smith v. Ameritech, 129 F. 3d 857, 863 (6th Cir. 1997).*

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56 (c).* A genuine issue of material fact exists when thee is "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986).

The facts establish that SCC is a not – for – profit financial institution which provides loans to small minority businesses, to female – owned businesses, and to businesses in low – income areas throughout Tennessee. The institution is designed to provide assistance to individuals who do not have access to traditional financing options. SCC is a wholly owned lending and investment subsidiary of Technology 2020. Technology 2020 is a not – for – profit organization initiated, in part, to create a strong private sector information technology industry. Travis Flenniken is employed by Technology 2020 and is assigned as a loan manager for SCC in its Memphis, Tennessee office.

SCC's programs are generally funded through private donations, public contributions, or funds that SCC borrows from other private financial institutions. In

February of 2004, half of SCC's loans in the Memphis area wee to minority – owned businesses.

Byrd's civil action is based upon a visit he had with Flenniken at SCC's office to discuss the availability of loans for a proposed restaurant and the expansion of an existing bail bond business. Just before Byrd's visit, Preston Byrd, Byrd's son, had met with Flenniken regarding a loan for his business. Preston Byrd's business loan application was subsequently denied as he was under a federal indictment for fraud in connection with his business. Preston Byrd's appearance at his father's meeting with SCC after his own loan application had been denied raised concerns with SCC that Byrd may have been seeking a loan for his son.

It is undisputed that Preston Byrd was under a federal indictment and that this fact was the cause for concern by SCC with respect to Byrd's loan requests. Byrd asserts that Flenniken's refusal to provide him a loan because of the father – son relationship constituted racial discrimination. *See generally 42 U.S.C. § 2000d.*

Byrd contends that the district court erred in dismissing his case for failing to state a claim under § 1983. In order to establish a cause of action under § 1983, a plaintiff must allege that he was deprived of a right or interest secured by the Constitution or the laws of the United States and that the defendant deprived him of that right or interest while acting under color of state law. *Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 – 57 (1978).* Byrd has failed to satisfy either element of a § 1983 claim. A plaintiff has no constitutional right to receive a loan from a private lender. Further, the defendants cannot be said to have been acting under color of state law as Flenniken is a private citizen and the lending institution is a private not – for – profit organization.

See Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F. 2d 927, 929 – 32 (1st Cir. 1974). Accordingly, the district court did not err in dismissing Byrd's § 1983 claim.

As to Byrd's claim of discrimination under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691, a creditor may not discriminate "against any applicant, with respect to any transaction...on the basis of race, color, religion, national origin, sex, or marital status, or age (provided the applicant has the capacity to contract)." 15 U.S.C. § 1691(a)(1).

The purpose of the ECOA is to eradicate credit discrimination. *Mays v. Buckeye Rural Elec. Coop., In., 277 F. 3d 873, 876 (6th Cir. 2002).* Given the similar purpose the ECOA has with Title VII, 42 U.S.C. §, 2000, we apply the analytical framework of Title VII in considering allegations of credit discrimination. *Id.*

A plaintiff may create an inference of discrimination under the ECOA by establishing: 1) that was a member of a protected class; 2) that he applied for credit with the defendant; 3) that he was qualified to receive the credit; and 4) that he was denied the extension of credit despite his qualifications. *Id. at 876 – 77.* Once the plaintiff has established a prima facie case of discrimination, the burden shifts to the credit institution to produce a legitimate, non – discrimination criminatory reason for its actions. If the defendant carries its burden of production, the presumption raised by the plaintiff's prima facie case is rebutted: A plaintiff must then prove, by the preponderance of the evidence, that the lenders stated reasons for its actions were a pretext for discrimination. *See St. Mary's Honor 502, 518 – 19 (1993).* The evidence establishes that Byrd was not a victim of credit discrimination. The defendants established that they had concerns as to whet-

her Byrd actually wanted a loan for his son. As the defendants articulated non – discriminatory (and non – pretextual) reasons for their actions, Byrd failed to state a claim under the ECOA.

Byrd contends that the district court erred by not allowing him to complete discovery prior to granting summary judgment to the defendants. The record establishes that the defendants moved to stay discovery pending their motion to dismiss. The stay was granted by the district court. The court of appeals will not interfere with the trial court's control of its docket except on the clear showing that the procedures had resulted in actual and substantial prejudice to the complaining litigant. *In re Air Crash Disaster, 86 F. 3d 498, 516 (6th Cir. 1996).* As Byrd's own allegations establish that he was claiming discrimination against defendants whose very purpose was to advance loans to minority businesses, the district court did not abuse its discretion in staying discovery until it could rule upon the defendants' motion to dismiss.

Accordingly, we affirm the district court's judgment. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

TYRONE A. BYRD

V. **N0. 03 – 2490 B**

TRAVIS FLENNIKEN, SOUTH-EAST COMMUNITY CAPITAL, TECHNOLOGY 2020 **MARCH 22, 2004**

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

Before the court is the motion of the defendants, Travis Flenniken, Southeast Community Capital Corporation ("SCC) and Technology 2020, to dismiss the plaintiff's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Rule permits the court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The Rule requires the court to "construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief." Grindstaff v. Green, 133 F. 3d 416, 421 (6th Cir. 1998). However, the court is not required to "accept as true legal conclusions or unwarranted factual inferences." Id. In order to avoid dismissal under Rule 12(b)(6), a complaint must contain either direct or inferential allegations with respect to all the material elements of the claim to sustain recovery under some viable legal

theory. Wittstock v. Mark A. Van Sile, Inc., 330 F. 3d 899, 902 (6th. 2003); Lewis v. ACB Bus. Sevs., Inc., 135 F. 3d 389, 406 (6th Cir. 1998). The court's narrow inquiry on a motion to dismiss under Rule 12(b)(6) "is based upon whether the claimant is entitled to offer evidence to support the claims, not whether the plaintiff can ultimately prove the facts alleged." Osborne v. Bank of Am., Nat'l Ass'n, 234 F. Supp. 2d 804, 807 (M.D. Tenn. 2002) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 . Ed. 2d 90 (1974).

> The plaintiff has alleged in his initial complaint as follows:
>
> 1. That on March 10, 2003, your, Plaintiff, Tyrone A. Byrd called the Ressiance Center, located at 555 Beale Avenue, Memphis, Tennessee, and talked to Ms. Beverly Going and was set an appointment to meet with her on March 12, 2003, 9:00 a.m. at the 555 Beale Avenue address.
>
> 2. That on March 12, 2003 your, Plaintiff Tyrone A. Byrd went to the Renessiance Center, 555 Beale Avenue, Memphis, Tennessee, signed in at the front desk requesting to see Ms. Goings.
>
> 3. That after waiting for about ten (10) to fifteen (15) minutes, Defendant, Travis Flennigan came out and greeted your, Plaintiff, stating he was to talk to your Plaintiff instead [sic] of Ms. Goings

due to her being in a business meeting.

4. That your, Plaintiff proceeded to a section, following Defendant, Travis Flennigan where the both of them were seated at a table.

5. That your, Plaintiff, Tyrone A. Byrd began to explain the purpose of being there in which was seeking two separate [sic] loans, one to expand [sic] your, Plaintiff's present business operation, which is a Bail Bond business and two, to start up a Bar – B – Que Restaurant business in the City of Memphis, Tennessee.

6. That shortly after your, Plaintiff beginning [sic] to explain his request, your, Plaintiff's son Preston Byrd came around after being acknowledged by both your Plaintiff and Defendant, Travis Flennigan.

7. That immediately after Preston Byrd was seated the Defendant, Travis Flennigan's attitude changed, he became very disrespectful and stated that due to your, Plaintiff being related to Preston that he could not and would not except [sic] your, Plaintiff's loan request or do any business with your, Plaintiff.

8. That your, Plaintiff began to explain that his business request were totally

> separate [sic] from Preston, then the Defendant Travis Flennigan responded [sic] by stating any money that your, Plaintiff may get would be gotten for turn over to Preston and that he had no more to discuss concerning your, Plaintiff's requests and refused to allow your, Plaintiff to apply for any loan.
>
> 9. That your, Plaintiff attempted to explain again and was very rudely turned off whereas Defendant Travis Flennigan stated he had made his decision not entertain your, Plaintiff's loan requests, he got up from his seat and stated Ms. Going would back him and then he hurriedly walked away leaving Preston and your, Plaintiff seated at the table.

(Compl. For Attached, Damages and Equitable Relief at (unnumbered) pp. 2-3.) In his amended complaint, the plaintiff further alleged that Flennigan's refusal to extend the loan was racially motivated. Byrd has initiated this lawsuit, pursuant to 42 U.S.C. § 1983, alleging violations of the Fourteenth Amendment Due Process Clause, Title VI of the Civil Rights Act of 1964, the Equal Credit Opportunity Act codified at 15

U.S.C. § 1691 ("ECOA"), and Tennessee Code Annotated §§ 48 –58 –503 and - 507. The defendants seek dismissal of all claims except that brought under Title VI.

Section 1983 imposes liability on any "person who,

under color of any statute, ordinance, regulation, custom or usage, of any State" subjects another to "the deprivation of any rights, privileges, or immunities secured by the Constitution or laws." 42 U.S.C. § 1983. A § 1983 plaintiff must establish "(1) that there was the deprivation of a right secured by the Constitution and (2) that the deprivation was caused by a person acting under color of state law." Wittstock, 330 F. 3d at 902. Section 1983 does not provide a source of substantive rights "and does not provide redress for common law torts – the plaintiff must allege a violation of a federal right." Berg v. County of Allegheny, 219 F. 3d 261, 268 (3d Cir. 200), cert. Denied, 531 U.S. 1072, 121 S. Ct. 762, 148 L. Ed. 2d 664 (2001).

In support of his constitutional claim, the plaintiff alleges that his request for a loan was denied without due process. The Fourteenth Amendment prohibits states from depriving persons of life, liberty or property without due process of law. U.S. Const. Amend. XIV, § 1. However, if an individual has no cognizable liberty interest at stake, no process whatever is due. See Ashiki v. I.N.S., 233 F. 3d 913, 921 (6th Cir. 2000). Stated differently, "[t]he requirements of due process are implicated only if there has been a deprivation of an interest 'encompassed by the Fourteenth Amendment's protection of liberty and property." Knoblauch v. City of Warren, 268 F. Supp. 2d 775, 778 (E.D. Mich. 2003) (quoting Board of Regents of State Colls. V. Roth, 408 U.S. 564, 570, 92 S. Ct. 2701, 2705, 33 L. Ed. 2d 548 1972). "Liberty interests that are protectible under the due process clause can arise either directly from the Constitution, or indirectly from the laws of the states." Prater v. City of Burnside, 289 F. 3d 417, 431–32 (6th Cir.), cert. denied, 537 U.S. 1018, 123 S. Ct. 550, 154 L. Ed. 2d 425 (202) (quoting Williams v. Vidor, 17

F. 3d 857, 864 (6ht Cir. 1994) (Jones, j., dissenting). Thus, the court must determine whether the plaintiff ha a liberty interest in obtaining a loan from SCC.

The essence of the plaintiff's claim is that he has been denied a business opportunity. In Bannum, Inc. v. Town of Ashland, 992 F. 2d 197 (4th Cir. 1990), the operator of a halfway house for inmates was advised by the Bureau of Prisons that it would receive a contract to open a facility in Ashland, Virginia. The plaintiff was later notified, however, that the contract would not be finalized as the city had decided to withdraw its approval. Bannum, Inc., 922 F. 2d at 199. The operator brought a civil rights action against the city alleging that the municipality had deprived it of a liberty interest without due process in violation of the Fourteenth Amendment. Id. The Fourth Circuit found for the defendant, stating as follows:

> When Bannum argues that Ashland's withdrawal of approval deprived it of liberty interest by denying it a business and employment opportunity, it must be contending that Bannum was denied the freedom and right to *pursue* a business or to *seek* employment... It is the impairment of the *ability* to take action that is protected as a liberty interest. Thus, when a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, a liberty interest is implicated. The mere of a business or employment opportunity, without more, does not deprive a person of a liberty interest, for the ability to obtain future business or

> employment opportunities is not jeopardized.... There is no suggestion that the State...imposed on [the plaintiff] a stigma or other disability that foreclosed his freedom to take advantage of other...opportunities.

Id. at 201 (internal citations and quotation marks omitted) (emphasis in original); accord Med Corp., Inc. v. City of Lima, 128 F. Supp. 2d 454, 457 (N.D. Ohio 2000), aff'd, 296 F. 3d 404 (6th Cir. 2002). Similarly, in the employment context, which the court finds analogous to the instant situation, in order to show the deprivation of a liberty interest a plaintiff must establish that the alleged state action "significantly altered or denied him...the opportunity to pursue a *particular calling or occupation.* It is the liberty to pursue a calling or occupation, and not the right to a *specific job,* "that is protected by the Fourteenth Amendment. Se Kepler v. Mirza, 102 F. Supp. 2d 617, 623 (W.D.Pa. 1999) (citing Piecknick v. Commonwealth of Penn., 36 F. 3d 1250 (3d Cir. 1994), aff'd sub nom. McCleary v. Mirza, 205 F. 3d 1329 (3d Cir. 1999), cert. Denied, 529 U.S. 1110, 120 S. Ct. 1965, 146 L. Ed. 2d 796 (2000) (emphasis added); see also Jones v. Sabis Educ. Sys., Inc., 52 Supp. 2d 868, 879 – 80 (N.D. Ill. 1999).

In this case, the court is aware of no cases supportive of a finding that Byrd had protected liberty interest in receiving a loan from any particular lender. Rather, there was nothing to prevent him from walking down the street to another bank or other financial institution and applying for a loan. Thus, as the court finds that the plaintiff has failed to establish a deprivation of a loan. Thus, as the court finds that the plaintiff has failed

to establish a deprivation of a right secured by the Constitution, his § 1983 claim based on the Fourteenth Amendment is without merit.

The ECOA prohibits discrimination by a creditor "against any applicant, with respect to any credit transaction...on the basis of race, color, religion, national origin, sex or marital status, or age provided the applicant has the capacity to contract)." 15 U.S.C. § 1691(a)(1). In order to establish a prima facie case of credit discrimination under the ECOA, a plaintiff must show that (1) he was a member of a protected class, (2) he applied for credit with the defendant, (3) he was qualified to receive the credit sought; and (4) he was denied the extension of credit despite his qualifications. Mays v. Buckeye Rural Elec. Co – op, Inc., 277 F. 3d 873, 873, 876 – 77 (6th Cir. 2002). The court finds that the plaintiff has sufficiently alleged a violation of the ECOA on the basis of racial credit discrimination to survive the rather low threshold applicable to a motion to dismiss. Of course, whether he will be able to prove his claims remain to be seen.

Finally, the defendants seek dismissal of plaintiff's claims under Tennessee Code Annotated §§ 48 – 58 – 503 and – 507. Section 503 provides that

> [u]nless limited by its charter, a corporation shall indemnify a director who is wholly successful, on the merits or otherwise, or who is immune from suit under the provisions of § 48 – 58 – 601, in the defense of any proceeding to which the director was a party because the director is or was a director of the corporation against reasonable expenses

> incurred by the director in connection with the proceeding.

Tenn. Code Ann. § 48 – 58 – 503 (2002 Repl.). Under Section 507,

> [u]nless a corporation's charter provide otherwise:
>
> (1) An officer of the corporation who is not a director is entitled to mandatory indemnification under § 48 – 58 – 503, and is entitled to apply for court – ordered indemnification under § 48 – 58 – 505 in each case, to the same extent as a director;
>
> (2) The corporation may indemnify and advance expenses under this part to an officer, employee, or agent of the corporation who is not a director to the same extent as to a director; and
>
> (3) A corporation may also indemnify and advance expenses to an officer, employee, or agent who is not a director to the extent, consistent with public, policy, that may be provided by its charter, bylaws, general or specific action of its board of directors, or contract.

Tenn. Code Ann. § 48 – 58 – 507 (2002 Repl.). As neither of these statutes provide for suit by this plaintiff, to the extent Byrd seeks recovery there under, his claims are DISMISSED.

For the reasons articulated herein, the defendants' motion to dismiss the plaintiff's claims under the Fourteenth Amendment and Tennessee statutory law is GRANTED. The motion to dismiss Byrd's claim under the ECOA is DENIED.

IT IS ORDERED this 22nd day of March, 2004.

/s/ J.D. Breen
J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

TYRONE A. BYRD

V. **NO. 03 –2490 - BA**

TRAVIS FLENNIKEN, SOUTH-EAST COMMUNITY CAPITAL AND TECHNOLOGY 2020 **OCTOBER 6, 2003**

AMENDMENT TO COMPLAINT FOR ATTACHED, DAMAGES AND EQUITABLE RELIEF

This original complaint was filed on June 2, 2003, in the Thirtieth Judicial District Circuit Courts Of Tennessee At Memphis, by your Plaintiff, Tyrone A. Byrd, pro se, in pursuant to 42 USCA § 1983, 15 USCA § 1691, TCA 48 –58-503, TCA 48 – 58 – 507 and TCA 16 – 10 – 101. On June 30, 2003, the Defendants, in this above styled cause, by way of counsel, removed the original complaint, along with several request for discovery, to the United States District Court For The Western District Of Tennessee Western Division. That after several motions have been filed, by both the Defendants and your Plaintiff, on September 16, 2003, this Honorable United States District Court signed an order granting your Plaintiff the right to amend the original complaint For Attached, Damages And Equitable Relief.

That your Plaintiff, Tyrone A. Byrd, pro se, do hereby amend the original complaint, specifically, in pursuant to 42 USCA § 1983 (1089), Due Process Clause General, (1090), Procedural Due Process, and (1091),

Substantive Due Process, 15 USC § 1691(a)(1), Racial Discrimination, 42 USCA § 2000d, Title VI of the 1964 Civil Rights Act, TCA 48 – 58 – 503 and TCA 48 – 58 – 507, who continue in suing all of the above named Defendants, in an individual and joint capacity, For deprivation of your Plaintiff's civil rights to due process and for racial discrimination against your Plaintiff, all that is secured by Federal constitution and laws of the United States and the State of Tennessee; your Plaintiff further states that the above named Defendants have acted under color of state law.

Your Plaintiff, Tyrone A. Byrd, remains at the same resident of 5163 Ronhart Drive, Memphis, Tennessee 38109 as stated in the original complaint.

The Defendants, Travis Flenniken, Southeast Community Capital and Technology 2020 are still jointly connected in a capacity of employer and employee relationship having the same office location and can be served through counsel John B. Starnes, 165 Madison Avenue, Suite 2000, Memphis, Tennessee 38103.

AMEND FACTS

1. On March 12, 2003, your Plaintiff, Tyrone A. Byrd went to the Renaissance Center, located at 555 Beale Street, Memphis, Tennessee seeking two (2) loans. In an interview with Defendant, Travis Flenniken your Plaintiff attempted to apply for two (2) loans, your Plaintiff was refused application and due process procedure, by Defendant, Travis Flenniken who stated his reason for such refusal was because your Plaintiff is related to Preston E. Byrd, who is a son of your Plaintiff, all facts recorded in paragraphs one (1) through nine (9) of the original complaint's fact section

details all that has led to the filing of the original and this amend complaint.

2. That Defendant, Technology 2020 and Defendant, Southeast Community Capital non – profit Corporations formed in the state of Tennessee as public benefit entities. (SEE ATTACHED CHARTERS EXHIBITS "A" and "B")

3. That Defendant Technology 2020, in a joint relationship with Defendant Southeast Community Capital and Defendant Travis Flenniken are all "state actors" where as under "public function" they exercise powers over state and federal loan programs, administering over by them, such as Tennesseed Fund 1, Nashville Opportunity Fund, Small Business Administration Micro Loan Fund and many other financial products listed on the attached exhibits. (SEE ATTACHED EXHIBITS "C", "D", "E" AND "F")

4. That Defendant Technology 2020 and Defendant Southeast Community Capital not only administer over state and federal government loan programs, but they have received loans from the federal government to assist their operations, by way of the Small Business Administration; they are at present receiving assistance indirect, by utilizing government office space such as the office at 555 Beale Street, Memphis, Tennessee and other office spaces in other cities in Tennessee. (SEE ATTACHED EXHIBIT "F" PARAGRAPH 3)

5. That the utilization of federal assistance direct or indirect, subject all of the Defendants to an obligation of fair and just considerations in their day to day procedures of screening all citizen applicants for loans administered by them.

6. That Defendant Technology 2020 and Defendant Southeast Community Capital are subject to federal regulations as in the contents of Federal Register; where

as the Code of Federal Regulations govern banks and credit assistance programs offered by not – for – profit organizations that are under section 501(c) of the Internal Revenue Code of 1954 for the benefit of economically disadvantaged class of person. (SEE ATTACHED EXHIBIT 'G' SECTION 202.8 IN THE FEDERAL REGISTER)

7. That Defendant Travis Flenniken, by denying your Plaintiff, Tyrone A. Byrd the right to apply for a loan, as stated in the original complaint "Fact Section", has created an individual and joint act, between him, Defendant Technology 2020 and Defendant Southeast Capital, of depriving your Plaintiff the right of due process procedure.

8. That the due process procedure of the Defendants loan programs are; 1. an interview of an applicant, 2. taking loan application information from the applicant, 3. running a credit check on an applicant, 4. submitting the application and credit report to loan approval committee, and 5. whereas committee approve or deny applicant by sending out a letter of such.

9. That Defendant Technology 2020, Defendant Southeast Community Capital and employee, Defendant Travis Flenniken, being creditors and under the regulations, as set out in the Federal Register, that govern banks and such organizations, are prohibited to discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction. (SEE ATTACHED EXHIBIT "G" SECTION 202.4 IN THE FEDERAL REGISTER)

10. That the English language consist of many words that are of the same meaning, such as "Negro", "Colored" and "Black", having the same "Racial" meaning; "Related" means same family, "Family" means

related by ancestry, "Ancestry" means family and "Race mean same ancestry; family; which mean to speak either of the above is to speak racial. (SEE ATTACHED EXHIBIT "H" TAKEN FROM WEBSTER'S DICTIONARY)

11. That Defendant Travis Flenniken refusing due process procedural to your Plaintiff, Tyrone A. Byrd, stating because of related to Preston E. Byrd, who is a son of your Plaintiff, has made a statement that is racial, as defined in dictionaries of the English language; the Defendant's refusal, along with such statement, has committed an act of racial discrimination against your Plaintiff, Tyrone A. Byrd and has deprived your Plaintiff of civil rights secured by Federal Constitution and the laws of the United States and the State of Tennessee. (SEE ATTACHED EXHIBIT "H")

AMEND CAUSE OF ACTION

Based on all facts previously stated in the original complaint, facts stated hereto in this amend complaint, evidence hereto attached as exhibits and facts to be adduced during discovery or trial, your Plaintiff, Tyrone A. Byrd, continue in the charging all of the above named Defendants, in this cause, are liable to him based on the following:

1. That Defendant Technology 2020, being the formulator of Defendant, Southeast Community Capital and the employer of Defendant Travis Flenniken, individually and jointly, have violated the laws of the United States, that are secured by Federal Constitution and have deprived your Plaintiff, Tyrone A. Byrd the civil rights of "Due Process Procedural" of the Fourteenth Amendment as under 42 USCA § 1983 (1089) (1090) (1091) and are liable to your Plaintiff,

Tyrone A. Byrd, injured in an action at law, suit in equity, or other proper proceeding for redress. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subject, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. That Defendant Technology 2020, defendant Southeast Community Capital and Defendant Travis Flenniken, jointly, being and representing, federally assisted programs organization, have, jointly and individually, violated your Plaintiff, Tyrone A. Byrd civil rights as protected and secured under Title VI Of The 1964 Civil Rights Act, 42 USCA § 2000d; Prohibition against exclusion of, and discrimination under federally assisted programs on ground of race, color, or national origin. No person in the United States shall, on the ground race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. (SEE ATTACHED EXHIBIT "F" PARAGRAPH 3)

3. That Defendant Technology 2020, Defendant Southeast Community Capital and Defendant Travis Flenniken, jointly and individually racially discriminated against your Plaintiff, Tyrone A. Byrd as cited in 15 USCA § 1691(a)(1) and are all liable to your Plaintiff for denial under the Equal Credit Opportunity Act: It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of credit transaction on the basis of race; your Plaintiff,

Tyrone A. Byrd has the capacity to contract; as required under this section.

4. That your Plaintiff, Tyrone A. Byrd also submit all that has been recorded in the Original Complaint, "Cause Of Action" section (1 through 5), as reasons, in conjunction with all recorded in this "Amend Cause Of Action", for all of the Defendants in this above styled cause, as being liable to your Plaintiff.

AMEND DAMAGES

That based on all of the facts previously recorded and filed in the original complaint and all of the hereto facts in this amend complaint, your Plaintiff, Tyrone A. Byrd, pro se, continue in suing the Defendant Travis Flenniken, Defendant Technology 2020 and Defendant Southeast Community Capital, jointly and individually for deprivation of your Plaintiff's civil rights to due process procedural as secured by the Fourteenth Amendment of the Federal Constitution and laws of the United States and the State of Tennessee, in the amount of $10,000,000, for all of the above named Defendants in a conspiracy of racial discrimination, against your Plaintiff as secured under the Equal Credit Opportunity Act, the amount of $10,000,000, for all of the above named Defendants jointly and individually hindering and blocking your Plaintiff's business growth, the amount of $10,000,000, for all of the above named Defendants, hindering and blocking your Plaintiff's start up business the amount of $10,000,000 and for all of the above named Defendants jointly and individually, tremendous creation of disappointment, exacerbation and mental anguish upon your Plaintiff, the amount of $10,000,000 and for all of above named Defendants' actions of malice, the amount of $10,000,000 for punitive damages,

all totaling $60,000,000 and any Attorney fees or what so ever other relief and cost this Honorable Court may deem fit and just in this cause.

Respectfully submitted,

/s/ Tyrone A. Byrd
Tyrone A. Byrd, pro se
5163 Ronhart Drive
Memphis, TN 38109
901 – 237 - 4846
901 – 465 - 6878

Second Amended and Restated Charter Of Southeast Community Capital Corporation

(formerly known as Technology 2020 Finance Corporation, Inc.)

Pursuant to Section 48 – 60 – 106 of the Tennessee Nonprofit Corporation Act, Tennessee Code Annotated, Section 48 – 51 – 101, et. seg.. SOUTHEAST COMMUNITY CAPITAL (formerly known as Technology 2020 Finance Corporation, Inc.) (the "Corporation") adopts the following Second Amended and Restated Charter.

The original Charter of the Corporation was filed with the Secretary of State of Tennessee on or about December 21, 1999. The Amended and Restated Charter of the Corporation was filed with the Secretary of State of Tennessee on or about December 8, 2000. The control number of the Corporation is 0381683.

The Second Amended and Restated Charter contains one of more amendments to the Amended and Restate Charter of the Corporation and has been approved by the entire Board of Directors of the Corporation.

This Second Amended and Restated Charter contains one of more amendments to the Amended and Restated Charter supersedes the original Charter of the Corporation and all amendment thereto.

Name

1. The name of the Corporation is Changed to Southeast Community Capital Corporation.

Public Benefit

2. The Corporation is a public

benefit corporation.

Corporation Registered Office and Registered Agent

3. The initial registered office of the Corporation is Woolf, McClane, Bright, Allen & Carpenter, PLLC 900 S. Gay Street, Knoxville, Knox County, Tennessee 37902 - 1810; and its registered agent at that office is James M. McCarten.

Incorporator

4. The name of the Incorporator is James M. McCarten, and his address is 900 Riverview Tower, 900 S. Gay Street, Knoxville, Tennessee 37902 – 1810.

Principal Office

5. The street address and zip code of the principal office of the Corporation is 1020 Commerce Park Drive, Oak, Ridge, Tennessee 37830.

Not for Profit

6. The Corporation is not for profit.

Charter
Of
Technology 2020 Finance Corporation, Inc.

The undersigned person. having capacity to contract and acting as incorporator of a corporation under the Tennessee Nonprofit Corporation Act, Tennessee Code Annotated Section 48 – 51 – 101 et. seg...adopts the following Charter for such nonprofit corporation:

Name 1. The name of the corporation is Technology 2020 Finance Corporation, Inc.

Public Benefit 2. This corporation is a public benefit corporation.

Corporation Registered Office and Registered Agent 3. The initial registered office of the corporation is Woolf, McClane Bright, Allen & Carpenter, PLLC, 900 S. Gay Street, Knoxville, Knox County, Tennessee 37902-1810: and its registered agent at that office is James M. McCarten

Incorporator 4. The name of the incorporator is James M. McCarten, and his address is 900 Riverview Tower, 900 S. Gay Street, Knoxville, Tennessee 37902-1810.

Principal Office 5. The street address and zip code Of the principal office of the Corporation is Technology 2020, is 1020 Commerce Park Drive, Oak Ridge, Tennessee 37830.

Not for Profit 6. The corporation is not for profit.

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

TYRONE A. BYRD

V. **No. 03 – 2490 B**

TRAVIS FLENNIFEN, SOUTH-EAST COMMUNITY CAPITAL and TECHNOLOGY 2020 **JUNE 15, 2004**

ORDER DENYING PLAINTIFF'S MOTION FOR EXTENSION OF TIME TO COMPLETE DISCOVERY AND TO FILE RESPONSIVE PLEADINGS TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND TO SHOW CAUSE WHY SUMMARY JUDGMENT SHOULD NOT BE GRANTED

Before the court is the motion of the pro se plaintiff, Tyrone A. Byrd, for an extension of time to complete discovery and to file responsive pleadings to the motion of the defendants, Travis Flenniken, Southeast Community Capital Corporation an Technology 2020, for summary judgment. Byrd initiated this lawsuit pursuant to 42 U.S.C. § 1983 alleging violations of Fourteenth Amendment Due Process Clause, Title VI of the Civil Rights Act of 1964, the Equal Credit Opportunity Act codified at 15 U.S.C. § 1691, and Tennessee Code Annotated §§ 48 – 58 – 503 and – 507. In an order entered March 22, 2004, the court dismissed Byrd's § 1983 Fourteenth Amendment claim as well as his claims under Tennessee statutory law.

The plaintiff requests an extension of the discovery period in order to take depositions and propound written discovery upon the defendants in order for him to proper oppose their pending motion foe summary judgment. Rule 56(f), which governs such motion, provides that Fed. R. Civ. P. 56(f).

> [s]hould it appear from the affidavits of party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

A party has no absolute right to additional time for discovery and the determination of whether an extension of time is appropriate lies within the sound discretion of the district court. Lewis v. ACB Bus. Servs., Inc. 135 F. 3d 389, 409 (6th Cir. 1998). 'Rule 56(f), however, 'is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious.' The nonmoving party must show how postponement of a ruling on the motion will enable him to rebut the motion for summary judgment." Id. (citing Emmons v. McLaughlin, 874 F. 2d 351, 356 (6th Cir. 1989). An affidavit by the nonmoving party containing bare allegations "without a shred of supporting proof" is insufficient to warrant the granting of a Rule 56(F)

motion. Id. at 409 – 10.

The gravened of the plaintiff's request is that he seeks information concerning the defendants' status as state actors. The court, however, ruled in its March 22 order that the plaintiff had no constitutional claim and, therefore, no viable action under § 1983. The question of whether the defendants are state actors is now a moot point.[1] The remaining claims involve allegations of racial discrimination, which require in essence a showing that Byrd's failure to obtain a loan resulted from racial animus on the part of the defendants. See generally McDonnell Douglas Corp. v. Green, 41 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

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[1]A § 1983 plaintiff must establish "(1) that there was the deprivation of a right secured by the Constitution and (2) that the deprivation was caused by a person acting under color of state law." Wittstock v. Mark A. Sile, Inc., 330 F. 3d 899, 902 (6th Cir. 2003) (emphasis added). Thus, the existence of a state actor in only one element of the § 1983 claim upon which, alone, the claim cannot stand. If the act alleged does not rise to the level of a constitutional violation, and the court has held it did not, it is of no consequence whether the defendants were state actors.

In support of his motion, the plaintiff ha provided his affidavit in which he submits that a stay of discovery granted o the defendants pending the court's disposition of a motion to dismiss prohibited him from obtaining sufficient discovery. However, there is no indication in the affidavit, as there must be under the Rule, of how additional discovery would enable him to rebut the defendants' motion for summary judgment as to racial discrimination contained in the plaintiff's memorandum are not sufficient to support postponement of a ruling on

the dispositive motion. Moreover, although Byrd argues in his memorandum that he has not been provided with data concerning the number of loans made by the defendants o blacks, such information in of no value absent evidence of discrimination against the plaintiff, which Byrd simply has not shown can be obtained by additional discovery.

For the reasons set forth herein, the plaintiff's motion is DENIED. Furthermore, the plaintiff is hereby ORDERED to show cause within fifteen (15) days of the entry hereof why the defendants' motion for summary judgment should not be granted.

IT IS SO ORDERED this 15th day of June, 2004.

/s/ J. D. Breen
J. Daniel Breen
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

TYRONE A. BYRD

V. **No. 03 – 2490 B**

TRAVIS FLENNIKEN, SOUTH-EAST COMMUNITY CAPITAL And TECHNOLOGY 2020 **JUNE 15, 2004**

ORDER DENYING PLAINTIFF'S MOTION TO VACATE ORDER GRANTING DEENDANTS' MOTION TO STAY DISCOVERY

On September 12, 2003, Magistrate Judge James Allen granted the motion of the defendants to stay discovery pending disposition of their motion dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6). The pro se plaintiff, Tyrone A. Byrd, moved on March 1, 2004 to vacate the order of the magistrate judge. Under the Local Rules of this district, appeals from or objections to orders of the magistrate judge must be filed within ten days of the entry of the order. See LR72.1(g)(1). Thus, the plaintiff's motion is out of time. In any case, in an order entered March 22, 2004, the court granted in part and denied in part the motion to dismiss and, therefore, the stay no longer exists.

Based on the foregoing, the motion is DENIED.

IT IS SO ORDERED this 15th day of June, 2004.

/s/ J. D. Breen
J. DANIEL BREEN, U.S. DIS. JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

TYRONE A. BYRD

V. **No. 03 – 2490 B**

TRAVIS FLENNIKEN, SOUTH-EAST COMMUNITY CAPITAL and TECHNOLOGY 2020 **MARCH 1, 2004**

MOTION OF PLAINTIFF FOR EXTENSION OF TIME TO COMPLETE DISCOVERY AND TO FILE RESPONSIVE PLEADINGS TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COMES NOW your Plaintiff, Tyrone A. Byrd, pro se and respectfully moves this Honorable Court to grant your Plaintiff an extension of time to complete discovery and file responsive pleadings to the Defendants' Motion For Summary Judgment and will state the following:

1. That on September 11, 2003 a Rule 16(b) Scheduling Order was issued by this Honorable Court setting March 12, 2004 as the last date for completion of discovery in this above styled cause.

2. That an Order Granting Defendants' Motion To Stay Discovery was also issued on September 11, 2003.

3. That in order for your Plaintiff to properly oppose the Defendants' Motion For Summary Judgment, an extension of time is needed to complete discovery and to file responsive pleadings to the Defendants' Motion

For Summary Judgment.

A memorandum is hereto companying this motion in support of.

WHEREFORE PREMISES CONSIDERED, your Plaintiff, Tyrone A. Byrd, pro se respectfully moves this Honorable Court to grant your Plaintiff an extension of time to complete discovery and to file responsive pleadings to the Defendants' Motion For Summary Judgment.

Respectfully submitted,

/s/ Tyrone A. Byrd

Tyrone A. Byrd, pro se
10206 Herons Landings Cv.
Lakeland, Tennessee 38002
901 – 2374846
901 – 465 - 6878

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISON

TYRONE A. BYRD

V.

NO. 03 – 2490 BA

TRAVIS FLENNIKEN, SOUTH – EAST COMMUNITY CAPITAL AND TECHNOLOGY 2020

MARCH 1, 2004

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO VACATE ORDER GRANTING DEFENDANTS' MOTION TO STAY DISCOVERY AND MOTION OF PLAINTIFF FOR EXTENSION OF TIME TO COMPLETE DISCOVERY AND TO FILE RESPONSIVE PLEADINGS TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COMES NOW your Plaintiff, Tyrone A. Byrd, pro se and would respectfully submit this hereto Memorandum In Support Of Plaintiff's Motion To Vacate Order Granting Defendants' Motion To Stay Discovery And Motion Of Plaintiff For Extension Of Time To Complete Discovery And To File Responsive Pleadings To Defendants' Motion For Summary Judgment and state the following:

I. INTRODUCTION

Your Plaintiff, Tyrone A. Byrd, pro se, filed an original complaint, in this above style cause, in the Thirtieth Judicial District Circuit Courts of Tennessee on

June 2, 2003. The original complaint was moved, by the Defendants, to this United States District Court For The Western District Of Tennessee Western Division, on July 1, 2003. After several motions have been filed, by the Defendants' and your Plaintiff and a Rule 16(b) Scheduling Order being issued, by this Honorable Court; also an Order Granting Defendants' Motion To Stay Discovery was issued, your Plaintiff was granted authority to file an Amend Complaint alleging causes of action due to the Defendants being in violations of 42 USC § 1983(1089), Due Process Clause General, (1090), Procedural Due Process and (1091) Substantive Due Process, 15 USC § 16921(a)(1), Racial Discrimination, 42 USC § 2000d, Title VI of the 1964 Civil Rights Act, TCA 48 – 58 – 503 and TCA 48 – 58 – 507. The Defendants and your Plaintiff have issued Initial Disclosures Pursuant To Rule 26(a)(1), the Defendants have answered your Plaintiff's Amended Complaint and have filed a motion For Summary Judgment.

II. FACTUAL BACKGROUNG

Your Plaintiff, Tyrone A. Byrd, is a resident citizen who has moved from the original filing address of 5163 Ronhart Drive, Memphis, Tennessee 38109, to a present resident of 10206 Herons Landing Cove, Lakeland, Tennessee 38002. Your Plaintiff is self employed Bail Bondsman who has successfully operated a bail agency since November of 1975.

The Defendant Southeast Community Capital has alleged, without and complete overall document proofs, their purpose for making business loans, to whom and from what sources the funds for such loans are acquired

by them.

The Defendant Technology 2020 has alleged without any document proofs, it's relationship to Southeast Community Capital and has also produced no document proofs of it's overall business purpose in the State Of Tennessee.

The Defendant Travis Flenniken has alleged without any document proofs his employment by Technology 2020, no proofs of assigned to Southeast Community Capital and no document proofs stating the purpose of his employment in the Memphis, Tennessee area.

The Defendants have not stated the complete overall details nor reasons as to why your Plaintiff was being interviewed by Defendant Travis Flenniken, nor have all facts, of the interview, been stated that lead to your Plaintiff's reasons for filing this cause of action.

The Defendants states they are entitled to summary judgment without any document proofs of their not being state actors; nor have they submitted any document proofs of their non racial discrimination against your Plaintiff or their non violation of **15 USC § 1961, 42 § 1983 or Title VI of the 1964 Civil Rights Act.**

The Defendants have produced no documents proofs of how many loans that have been approved by them to minority Blacks in Memphis, nor throughout the State of Tennessee, nor any document proofs, to whom, the number and amounts of individual loans approved to Black in comparison to loans approved for Whites, in Memphis and throughout the State of Tennessee.

The Defendants have not produced any document proofs, such as, contractual agreements between them, the City of Memphis and other Cities throughout the State of Tennessee; nor have they produced any such

document proofs of contractual authorizing them to preside over all loan programs they oversee throughout the State of Tennessee; such as the Memphis Business Opportunity Fund, the Nashville Opportunity Fund, the Tennesseed Fund, the Telecommunications Assistance Program and all other funds they preside over throughout the State of Tennessee.

The Defendants have not produced any document proofs copies of Southeast Community Capital's nor Technology 2020 corporate bylaws stating how officers of the corporations are acquired and overall rules, regulations and guidelines governing their corporate operations.

The Defendants have not produced any contractual document proofs of all State Banks, Federal Banks, City, State and Federal programs whereby they have acquired funds to loan through their various loan products or programs.

The Defendants have not produced any contractual document proofs of the names of each and every private personal donors, nor each and every Corporate and organization donors that make up each loan program they preside over throughout the State of Tennessee.

II. LOCAL RULE 7.2(D)(2) DESIGNATION OF FACTS

1. Mr. Clint Gwin stating himself as being employed as the president of Southeast Community Capital has, I suppose, in summary details, given a description of various loans programs overseen and administered over by Southeast Community Capital. With all due respect to Mr. Gwin, he has not submitted or attached any

official document copies, such as contracts between Southeast Community Capital and lenders or donors, of each loan as described by him in his affidavit. He has not been available to your Plaintiff for cross-examination by deposition whereby the complete fullness of each loan program can be satisfactory examined.

2. Mr. David Snider has submitted his affidavit as being chief financial officer of Technology 2020. Again I find Mr. Snider, as Mr. Gwin, has not produced any official copies of document proofs of Technology 2020 limited relations to Southeast Community Capital, He has not been made available for cross-examination through deposition by your Plaintiff.

3. As to Defendant Travis Flenniken's affidavit, in all due respect to him, he has only stated part facts of the March 12, 2003 interview between him and your Plaintiff. He has stated his opinion as to why your Plaintiff was before him, but in his opinion, the full truth has not been made available for cross-examination, by your Plaintiff through deposition whereas the full truth can be brought out for submission to this Honorable Court. Defendant Flenniken has neither produced any official copies of documents to sustain his description of Southeast Community Capital's loan programs, nor his and Southeast Community Capital's contractual relationship or agreement between them and the City of Memphis. Defendant Flenniken has not explained what right, due to Preston Byrd's situation, given to him by Southeast Community Capital or Technology 2020 or the City of Memphis, to openly racially discriminate against your Plaintiff, none other than his personal assumptions. Defendant Flenniken, I submit, should be made available for examination through deposition by your Plaintiff.

The Defendants have created, through affidavits and other allegations, a large smoke screen of half true facts and testimonies in an effort to sweep your Plaintiff's complaint under the rug and pretend that no wrong was done to your Plaintiff by them. In all due respect to this Honorable Court, the Defendants have been allowed to hide behind the Order Granting Defendants' Stay of Discovery. Your Plaintiff prays for relief to properly defend and oppose the Defendants' Motion For Summary Judgment, by this Honorable Court vacating the Order Granting The Defendants' Motion To Stay Discovery and to authorize your Plaintiff, to depose, request production of documents, answers to interrogatories and admissions from the Defendants whereas the full truth can be sought for submission to this Court.

II. LAW AND ARGUMENT

A. In reference to Rule 56 Federal Rules of Civil Procedure (1963) Amendment subdivision (e), the last sentence of the last paragraph, your Plaintiff state the Defendants' Motion For Summary Judgment is inappropriate at this time. (SEE EXHIBIT 'A' ATTACHED)

> "And Summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition."

> "56 (f) Should it appear from the affidavits of a party opposing the motion

> that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

B. Your Plaintiff submits that there is a genuine issue as to material facts and that your Plaintiff is entitled, as a matter of law to ge given the authority through the gathering of depositions, documents, answers to interrogatories and admissions from the Defendants to properly oppose the Defendants' Motion For Summary Judgment.

> Jamison v. Pennsylvania Salt Manufacturing Co. 22 F.R.D. 238 and Wolotsky v. Huhn 960 F. 2d 1331 as cited in Ellison v. Garbarino et. al. 48 F. 3d 192,*; 1995 U.S. App. LEXIS 3647,**; 1995 FED App. 0066p (6th Cir.),***
>
> "Summary judgment may be granted only if the pleadings, depositions, admissions and affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law and any doubt as to the existence of a genuine issue of fact is to be resolved against the movant. Fed. Rules Civ. Proc. Rule 56 (c), 28 U.S. C.A."

C. Your Plaintiff submits, in accord with the above foregoings, that the Defendants have only produced affidavits to support their pleadings. There are no depositions, answers to interrogatories nor admissions available to this Honorable Court as required above whereas the showing of a genuine issue of fact can be sustained by the submissions of all facts and evidence surrounding the cause of actions.

> Jamison v. Pennsylvania Salt Manufacturing Co. also cite the following;
>
> "The truth or falsity of allegations in pleadings should not be adjudicated in advance of trial through the technique of filing affidavits which deny a party the right to cross-examine."

D. Your Plaintiff submits to this Honorable Court to vacate the Order Granting The Defendants' Motion To Stay Discovery whereby depositions, answers to interrogatories, production of documents and admissions can be obtained, by your Plaintiff, from the Defendants whereas your Plaintiff can properly oppose the Defendants' Motion For Summary Judgment.

> Fredrick Hart & Co., Inc. v. Recordgraph Corporation, 169 Federal Reporter, 2d Series
>
> "On motion to dismiss, complaint must be viewed in light most favorable to plaintiff and should not be dismissed unless it appears to a certainty that

> plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim, and no matter how likely it may seem that pleader would be unable to prove his case, he is entitled, upon averring a claim, to any opportunity to prove it."

E. Your Plaintiff further prays that this Honorable Court will grant your Plaintiff every opportunity to prove this case by removing any view of prejudice and grant your Plaintiff the opportunity to depose, obtain answers to interrogatories, production of documents and admissions from the Defendants as a matter of law.

> SEE Lewis v. ACB Business Services, Inc. 135 F.3d 389 (6th Cir. 1998)
>
> "Order denying further discovery will be grounds for reversal only if it was abuse of discretion resulting in substantial prejudice."

F. Your Plaintiff states that through the completion of discovery the Defendants will be uncovered from their covert position and put to the tests determining the Defendants as state actors.

> Se Ellison v. Garbarino, et. al. 48 F. 3d 192; 1995 U.S. App. LEXIS 3647: 1995 FED App. 0066P (6th Cir.)
> "The Sixth Circuit recognizes three tests for determining whether private conduct is fairly attributable to the state: the public function test, the state compulsion

test, and the nexus test. The public test requires that the private entity exercise powers which are traditionally exclusive are running elections or eminent proof that the state significantly encouraged or somehow coerced the private party, either overtly or covertly, to take a particular action so that the choice is really that of the state. Finally, the nexus test requires a sufficiently close relationship (that is, through state regulation or contract) between the state and private actor so that the action taken may be attributed to the state."

IV CONCLUSION

WHEREFORE PREMISES CONSIDERED, your Plaintiff, Tyrone A. Byrd, pro se, respectfully prays and moves this Honorable Court to reconsider, by vacating the Order Granting The Defendant Stay Of Discovery and to grant your Plaintiff's Motion For Extension Of Time To Complete Discovery And To File Responsive Pleadings To Defendants' Motion For Summary Judgment as a matter of law.

Respectfully submitted,

/s/ Tyrone A. Byrd

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NOT RECOMMENDED FOR FULL--TEXT PUBLICATION

No. 04-6153

UNTIED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TYRONE A. BYRD	)
	)
V.	) **ON APPEAL FROM THE**
	) **UNITED STATES**
TRAVIS FLENNIKEN; SOUTHEAST COMMUNITY CAPITAL CORPORATION; TECHNOLOGY 2020	) **DISTRICT COURT FOR**) **WESTERN DISTRICT OF**) **TENNESSEE**)) **DECEMBER 5, 2005**

ORDER

Before: NELSON and SUTTON, Circuit Judges; ZATKOFF, District Judge.*

Tyrone A. Byrd petition for rehearing of this court's of October 4, 2005, which affirmed a district court's dismissal of Byrd's civil complaint. After careful consideration, the panel concludes that it acted under no misapprehension of law or fact in issuing this order. Fed. R. App. P. 40(a).

Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

CONSTITUTION OF THE UNITED STATES FOURTEENTH AMENDMENT

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are Citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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42 § 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

FLAGG BROS., INC., v. BROOKS 436 U.S. 149

"The District Court dismissed the com-

plaint for failure to state a claim for relief under § 1983, which provides, *inter alia,* that every citizen to the deprivation of any rights secured by the Constitution and federal laws shall be liable to the injured party."

Flagg is in conflict with Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961); the gravity of Flagg is surrounding a New York Uniform Commercial Code § 7 – 210; the gravity of Burton is the defendant restaurant was located in a municipal – owned parking garage, and the city profited from the discrimination; Byrd's case before the court is more similar to Burton in as must as the Defendants office is located in a municipal – owned office building and the Defendants are intermediary lenders of the Small Business Administration loaning Taxpayer's dollars supplied to them by the SBA; the city is also profiting from the leasing of the office building space to the Defendants.

ADAMS v. VANDERMARK 855 f. 2D 312 (6TH Cir. 1988)

"The Supreme Court has used several theories, or tests, to determine whether an action was taken under color of state law or amounted to state action. The test most relevant to this case is the "symbiotic relationship" test, which the Supreme Court establish in Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961)."

"In Burton a restaurant that was located in a municipally – owned parking garage refused to serve a black man. The man sued, alleging that the restaurant's actions violated the fourteenth amendment. The Court found that the parking garage, and therefore the city, profited from the discrimination, and that the profits were "indispensable elements in...the financial success of a government agency." *Id.* at 724, 81 S. Ct. at 861. Consequently the Court held, "[t]he State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity," and thus the restaurant's discrimination was state action." *Id.* at 725, 81 S. Ct. at 862

HUGHES v. ROWE et. al., 449 U.S. at 5

"dismissed for failure to state a claim _ even under the controlling principle that a prisoner's complaint prepared without counsel should not be dismissed unless it appears beyond doubt that he can prove no set of facts entitling him to relief – nevertheless the complaint was adequate at least to require some response from respondents, by way of affidavit or otherwise, to petitioner's claim that his initial confinement to segregation violated

due process because it occurred without a prior hearing."

Byrd's § 1983 due process claim was dismissed, by the District Court, on a Defendant's 12(b)(6) motion to dismiss after the Defendants had responded by affidavits and otherwise; it was dismissed without a prior hearing before the district court.

BUCHANAN V. APEL, 249 f. 3D. 485, 488 (6TH Cir. 2001)

"A motion to dismiss under Rule 12(b) (6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." "*Conley v. Gibson, 355 U.S.* 41, 45 – 46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1967)." "In considering the motion, we must accept all factual allegations in the complaint as true." *See Gao v. Jenife,* 185 F. 3d 548, 552 (6th Cir. 1999)."

CONLEY V. GIBSON, 355 U.S. 41, 45, 46, 78 s. Ct. 99 2L. Ed. 2d. 80 (1957)

"In appraising the sufficiency of the com-

plaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which entitle him to relief."

"The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper." "The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim." "To the contrary, all the Rules require is "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."

CELOTEX CORPORATION V. MYRTLE NELL CATRETT, 477 U.S. 316 AT 316

"The Supreme Court, Justice Rehnquist, held that: (1) Rule 56(c) mandates the entry of summary judgment after adequate time for discovery against a

party who fails to make a showing sufficient to establish the existence of an element essential to that party's case as to which that party will bear the burden of proof at trial;"

JACK ANDERSON, et. al., V. LIBERTY LOBBY, INC. and WILLIS A. CARTO, 477 U.S. 242

"Plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment, even where the evidence is likely to be within the possession of the defendant, as long as plaintiff has had a full opportunity to conduct discovery." "Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C."

LEWIS V. ACB BUSINESS SERVICE, INC, 135 F. 3d 389 (6TH CIR. 1998)

"Complaint should not be dismissed for failure to state claim unless it appears beyond doubt, that plaintiff can prove no set of facts in support of his claim which would entitle to relief." "Fed. Rules Civ. Proc. Rule 12(b)(6), 28 U.S.C."

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

TYRONE A. BYRD

V. **No. 03 – 2490 - BA**

TRAVIS FLENNIKEN SOUTHEAST COMMUNITY CAPITAL AND TECHNOLOGY 2020 **FEBRUARY 3, 2004**

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COMES NOW defendants, Travis Flenniken, Southeast Community Capital ("SCC") and Technology 2020, and submit this Memorandum in support of their Motion for Summary Judgment and state:

I. INTRODUCTION

On June 2, 2003, this action was commenced in the Circuit Court of Shelby County, Memphis, Tennessee, with the pro se filing of a complaint by the plaintiff herein, Tyrone A. Byrd. Plaintiff subsequently amended his complaint after defendants filed a motion to dismiss. The Amended Complaint alleges causes of action under 42 U.S.C. § 1983, 42 U.S.C. § 2000d (Title VI), 15 U.S.C. § 1691 (Equal Credit Opportunity Act), the Due Process Clause and possibly various state laws, in

Connection with plaintiffs efforts to secure business loans from SCC.[1] All of plaintiff's causes of action are predicated upon alleged racial discrimination.

II. FACTUAL BACKGROUND

SCC is not for profit financial institution that provides loans and investments to small minority and female owned businesses, and to businesses in low-income areas throughout Tennessee that do not have access to traditional financing options. SCC is a wholly owned lending and investment subsidiary of Technology 2020. Technology 2020. Technology 2020 is a not for profit organization initiated as part of a regional economic development strategy designed to lessen the dependence of the East Tennessee region on government spending and to create a stronger private sector driven information technology industry. Travis Flenniken is employed by Technology 2020, but is assigned as a loan fund manager for SCC in its Memphis office. Technology 2020 does not provide business loans or have any offices in the Memphis office Technology 2020 does not provide business loans or have any offices in the Memphis area.

Plaintiff's action stems from a visit to SCC's Memphis office where he met with Mr. Flenniken to discuss the availability of loans for a proposed restaurant and an existing bail bond business. Plaintiff claims that Mr. Flenniken discriminated against him based on his race refusing to take a loan application or provide him with a loan because of plaintiff's relationship to his son, Preston Byrd. Plaintiff claims that because his son is African - American, Mr. Flenniken discriminated against

him based on his race by refusing to take a loan application or provide him with a loan because of plaintiff's relationship to his son, Preston Byrd Plaintiff claims that because his son is African – American, Mr. Flenniken's alleged statement of loan refusal due to Mr. Byrd's relation to his son amounts to racial discrimination. Plaintiff alleges the conduct of Mr. Flenniken subjected SCC and his employer, Technology 2020, to liability.

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[1] Plaintiff's Amended Complaint, apparently relying upon and incorporating allegations of the initial complaint into the Amended Complaint. Therefore, defendants will at times cite in this memorandum, including in the designation of facts, to both the Amended Complaint and the initial complaint.

Defendants submit they are entitled to summary judgment. Plaintiff's § 1983 and due process claims fail as a matter of law because defendants are not state actors. Plaintiff's claim under the Equal Credit Opportunity Act, 15 U.S.C. § 1691, fails in that the Amended Complaint contains no allegation of discriminatory conduct prohibited under that statute. Plaintiff's Title VI action fails because there is no direct evidence of racial discrimination and plaintiff has not established a prima facie case. Finally, the state statutes plaintiff references in his Amended Complaint pertain to indemnification of corporate officers and

directors, and provide no private cause of action or damage remedy to plaintiff. In addition, plaintiff has chosen an exclusive federal remedy precluding state law claims.

II LOCAL RULE 7.2 (d)(2) DESIGNATION OF FACTS

1. SCC AND technology 2020 are private, non – profit corporation. (Amend. Compl., p.2, para. 2); (Affidavit of Clint Gwin, para. 2, attached hereto as Exhibit ("A"), (Affidavit of David Snider, para. 2, attached hereto as Exhibit "B").

2. Travis Flenniken is an employee of Technology 2020, but has been assigned to serve as the Loan Fund Manager for SCC in its Memphis office. (Affidavit of Travis Flenniken, para. 1, attached hereto as Exhibit "C"); (Gwin Affidavit, para. 5).

3. Technology 2020 formed SCC has a separate, wholly – owned subsidiary for the purpose of performing Technology 2020's lending operations. Technology 2020 assigned or transferred responsibility for administering Loan funds to SCC, and, with the exception of a loan fund available only in Hamilton County, Tennessee, Technology 2020 did not serve as an administrator or manager of any loan or guaranty funds at any time relevant to this lawsuit. Technology 2020 does not offer any financial products to consumers in the Memphis area, and has no offices in the Memphis area. (Snider Affidavit, paras. 3, 3-6).

4. SCC provides loans and investments to small minority and female – owned businesses, and to businesses in various low – income areas throughout Tennessee that do not have access to traditional financing options. (Gwin Affidavit, para. 2).

5. SCC serves as an administrator or manager of loan

and guaranty fund programs. These programs are generally funded through private donations, public contributions or funds that SCC borrows from other private financial institutions to relend. SCC receives management fees from both private and public sources for its management of these programs. (Gwin Affidavit, paras. 3-4).

6. SCC has internally produced and adopted creditworthiness and lending guidelines for all of the programs for which it makes loans. (Gwin Affidavit, para. 3)

7. On March 12, 2003, plaintiff met with Travis Flenniken at SCC's Memphis offices for the purpose of securing one or more loans for either a proposed restaurant or an existing bail – bond business. (Amend. Compl., p.3 para 5: (Flenniken Affidavit, para. 2).

8. During the meeting, Mr. Flenniken informed plaintiff that SCC did not lend to restaurants or re – lenders, and that a bail – bond business would be considered a re – lender. (Flenniken Affidavit, para. 2).

9. Mr. Flenniken also stated his concern that plaintiff's loan request may have been for the benefit of plaintiff's son, Preston Byrd. Preston Byrd had recently applied for a business loan from SCC, but was denied when SCC learned that Preston Byrd was under a federal indictment for wire fraud in connection with his business. Preston Byrd was informed of his denial less than two weeks before plaintiff, his father, met with Mr. Flenniken, (Amend. Compl. P. 2, para. 1); (Compl. P. 3, para 7); (Flenniken Affidavit, paras. 3-4).

10. Plaintiff was offered a loan application, but did not accept or complete a loan application. (Flenniken Affidavit, para. 5).

11. Mr. Flenniken did not inform plaintiff that SCC did not make loans to restaurants and re – lenders because

of his race, but because SCC lending policy generally does not allow for such loan. (Flenniken Affidavit, para. 7).

12. As of December 2003, SCC had made loans to 14 Memphis area businesses. Seven of there loans were made to minority – owned businesses. (Flenniken Affidavit, para 6).

III. LAW AND ARGUMENT

A. The standard for granting summary judgment is plainly satisfied in this case. Summary judgment is appropriate when the record reveals that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Johnson v. Hills & Dales General Hosp., 40 F. .3d 837, 839 (6th Cir. 1994) (quoting Fed. R. Civ. P. 56). As held by the Supreme Court in Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986), a party moving for summary judgment "may meet its burden by showing that there is an absence of evidence to support the nonmoving party's case." Johnson, 40 F.3d at 839. "The nonmoving party must do more than merely present its own pleadings and affidavits." Id. (citing Ashbrook v. Block, 917 F.2d 918, 921 (6th Cir. 1990)). In other words, "the nonmoving party must present 'significant probative evidence' to show that 'there is [more] some metaphysical doubt as to the material facts.'" Hopson v. Daimler Chrysler Corp., 306 F. 3d 427 (6th Cir. 2002) (quoting Moore v. Philip Morris Cos., 8 F .3d 335 339-40 (6th Cir. 1993)). Finally, a movant is entitled to summary judgment against a plaintiff "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that

party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

As outlined below, defendants are entitled to summary judgment in their favor on each of plaintiff's claims.

B. Plaintiff's § 1983 and Due Process Clause claims fail as a matter of law because defendants are not "state Actors".

1. § 1983.

Plaintiff alleges a cause action for deprivation of civil rights color of state law. Plaintiff claims that the "rude and disrespectful actions" of Mr. Flenniken, in not taking loan application or providing a loan due to plaintiff's relation to Preston Byrd, "made a statement that is racial, as defined in dictionaries of the English language." (Amend. Compl, pp. 4 – 5, para. 11); (Compl., p. 3, ¶ 7; p. 4, ¶ 2).

Section 1983 provides in relevant part:

> [e]very person who, under color of any Statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subject, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other U.S.C. § 1983. Two allegation are require I to state proper proceeding for redress.

42 U.S.C. § 1983. Two allegations are required in order to state a claim under § 1983:

> First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

Gomez v. Toledo, 446 U.S. 635, 640 (1980) (citing Monroe v. Pape, 365 U.S. 167, 171 (1961). Plaintiff's Amended Complaint fails to meet the requirement that the deprivation of a federally secured right was the hands of a state actor.

"It is not enough for a complaint under § 1983 to contain mere conclusory allegations of unconstitutional conduct by persons acting under color of state law. Some factual basis for such claims must be set forth in the pleadings." Chapman v. City of District, 808 F. 2d 459, 465 (6th Cir. 1986) (citing Place v. Shepherd, 446 F. 2d 1239 (6th Cir. 1971). Here, Plaintiff's Amended Complaint fails to state a claim under § 1983 because there is no factual basis alleged that would establish conduct by a state actor.

The scope of § 1983 is on the "[m]isuse of power, possessed by virtue of state law and made possible *only because the wrongdoer is clothed with the authority of state law."* Monroe v. Pape, 365 U.S. 167 (1961) (emphasis added). Although plaintiff claims his civil rights were deprived "under color of State Laws," this is a mere conclusory allegation not supported by any factual allegation. Plaintiff's allegations that SCC and Technology 2020 are public benefit corporations and administered various loan funds simply do not support his § 1983 claim.

The primary focus in determining whether a private

party's action constitutes state action is whether those actions are "fairly attributable to the state." Wolotsky v. Huhn, 960 F. 2d 1331, 1335 (6th Cir. 1992) (citing Lugar v. Edmondson Oil Co., 457 U.S. 992 (1982). The Supreme Court has set forth three tests to make the defendants liable under § 1983. These tests are: (1) the public function test: (2) the state compulsion test; and (3) the symbiotic relationship or nexus test. Id. Although plaintiff's Amended Complaint alleges only that defendants qualify as state actors under the public function test, defendants' conduct here cannot be fairly attributed to the state under any of these three test.

Under the public function test, a court looks to whether a private entity exercises powers traditionally exclusively reserved to the state. Id. Although plaintiff urges the defendants here fall within the public function test, Supreme Court precedent clearly provides otherwise Examples of powers traditionally exclusively reserved to the state include holding elections or eminent domain. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974) (citing Nixon v. Condon, 286 U.S. 73 (1932) (election); Terry v. Adams, 345, 352 (1953) (election); Marsh v. Alabama, 326 U.S. 501 (1946) (company town); and Evans v. Newton, 382U.S. 296 (1966) (municipal park). In Jackson the Supreme Court rejected a public function characterization of a utilities provider. With respect to this case, the conduct of a non – profit corporation making business loans is certainly not a power traditionally exclusively reserved to the state if a utility company providing necessary services to the public does not satisfy that definition.

Although not claimed by plaintiff, defendants' conduct also does not constitute state action under the state compulsion test. The state compulsion test requires that the state exercise such level of coercive power or

provide such encouragement that the choice of the private actor is legally deemed to be that of state. Wolotsky, 960 F. 2d at 1335. "More than mere approval or acquiescence in the initiatives of the private party is necessary to hold the state responsible for those initiatives." Id. (citing Blum v. Yaretsky, 457 U.S. 991, 1005 – 06 (1982). Here, there are no allegations in the Amended Complaint that the state directed or compelled Mr. Flenniken to refuse plaintiff's request for a business loan. In fact, SCC internally establishes its own credit worthiness and lending guidelines for its loan products, and no government agency was involved in the meeting between SCC and plaintiff.

Finally, under the symbiotic relationship or nexus test, the conduct of a private party may constitute state action when there is a sufficiently close nexus between the private party's action and the state so that the action of the private party can legally be deemed that of the state. Id at 1335. In order to meet this test, there must be a showing that the state is intimately involved in the private conduct in order for the private conduct to be attributed to the state for purposes of § 1983. Nowhere does plaintiff's Amended Complaint allege that SCC or Technology 2020 were state controlled entities. To the contrary, plaintiff's Amended Complaint recognizes that SCC and Technology 2020 are not state agencies, but rather private, non – profit organizations.

Through its own contractual arrangements or those assigned to it from Technology 2020, SCC administers various loan and guaranty fund programs, some of which are either partially or completely funded by certain governmental entities. However, an examination of well established precedent reveals the performance of contracts with governmental entities, even if such

activity constituted the entirety of a defendant's operations, would not render a private party a state actor. For example, in Rendell – Baker v. Kohn, 457 U.S. 830 (1982), the Supreme Court considered whether a private school could be deemed a state actor under the symbiotic relationship test. There, the non – profit school contracted to accept troubled students referred by city school systems. Id. at 832. The school received funds from both state and federal agencies which accounted for at least 90% of its operating budget, and 99% of its budget in one year. Id. In addition, the school operated under extensive city regulations in order to be eligible for payments. In finding the school was not a state actor, the Court stated that the "[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." Id. at 841. In another decision, Adams v. Vandermark, 855 F. 2d 312 (6th Cir. 1988), the Sixth Circuit had occasion to consider the symbiotic relationship test in circumstances similar to here. In Adams, plaintiff asserted a § 1983 claim against a non – profit corporation established to participate in local community action program grants and "administer□ federal, state, and local funds for various social programs that...[were] established by state law." Id. at 315. The non – profit loan fund manager in Adams handled funds from the United States Department of Energy and the Michigan Department of Labor, Bureau of Community Services. Also, "[f]ederal, state, and local funds constitute [d] between 90% and 99% of [defendant's] budget." Id. Moreover, the defendant operated in a city building in which space had been leased to it for a 30 year term for one dollar rent per year. Id. at 315 – 16.

The Sixth Circuit determined in Adams that the funding "almost entirely by public sources, "leasing of city office space at nominal rent and the presence of public officials on the defendant's board of directors were all insufficient to deem the defendant a state actor. Id. at 316; see also Crowder v. Conlan, 740 F. 2d 447, 450 (6th Cir. 1984) ("actions of a private entity do not become state action merely because the government provides substantial funding to the private party"); Gallagher v. "Neil Young Concert", 49 F. .3d 1442 (10th Cir. 1995) ("[p]ayments under government contracts and the receipt of government grants and tax benefits are insufficient to establish a symbiotic relationship between the government and a private entity"); Watts – Means v. Prince George's Family Crisis Ctr., 7 F .3d 40 (4th Cir. 1993) holding financial support of a private party by government not a sufficient reason to find state action); Mineo v. Transportation Mgt. Of Tenn., 694 F. Supp. 417 (M.D. Tenn. 1988) (refusing to find publicly – funded, government regulated public service party a state actor). Application of the above authority involving private parties with more extensive connection to the state than what is present here demonstrates that SCC's administration of loan funds, many of which consist of both public and private investments, its receipt of a portion of its management fees from governmental entities and its lease of office space from the City of Memphis does not transform the defendants into state actors.

2. Due Process Clause.

Plaintiff's Amended Complaint alleges a cause of action for violation of due process rights secured by the Fourteenth Amendment. (Amend. Compl., p. 5, para. 1). Defendants are entitled to dismissal of this claim as a

matter of law because they are private actors and fall outside the reach of the Fourteenth Amendment.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person within its jurisdiction the equal protection of the laws.

The Supreme Court has "affirmed the essential dichotomy set forth in that Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974) (citing Shelley v. Kraemer, 335 U.S. 1 (1948)); see also Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 486 (1988) ("Fourteenth Amendment protects [property] interest...only from a deprivation by state action"). "The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State.'" Rendell – Baker v. Kohn, 457 U.S. 830, 838 (1982) (quoting Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982)). As explained above, the defendants' status as private actors, as opposed to state actors, renders plaintiff's due process claim equally as unsustainable as his § 1983 claim.

C. There is no allegation of discriminatory conduct prohibited by 15 U.S.C. § 1691.

Although plaintiff's Amended Complaint recites the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C § 1691, and its promulgated regulations contained in 12 C.F.R. part 202, as a basis for his action, the Amended Complaint contains no factual allegations of any conduct prohibited by the ECOA. The ECOA provides in relevant part:

> It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction –
> (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the Capacity to contract)
> (2) because all or part of the applicant's income derives from any public assistance program; or
> (3) because the applicant has in good faith exercised any right under this chapter.

15. S.C. § 1691 (a) (1998).

"A complaint must contain either direct or inferential allegations with respect to all the material elements necessary to sustain a recovery under some viable legal theory." Id. (citing Scheid v. Fanny Farmer Candy Shops, Inc., 859 F .2d 434, 437 (6h Cir. 1988)). Plaintiff's ECOA claim fails in that the Amended Complaint lacks any factual allegation of prohibited class bases discriminatory conduct. Not only does

plaintiff's Amended Complaint fail to make any factual allegations with respect to conduct which is conduct which is prohibited by he ECOA, plaintiff explicitly alleges reasons for the loan refusal which fall outside the purview of the ECOA. Plaintiff alleges that after his son, Preston Byrd, joined the plaintiff's meeting with Mr. Flenniken, that "Travis Flennigan's [sic] attitude changed, he became very disrespectful and stated that *due to your, Plaintiff being related to Preston* that he could not and would not except [sic] your, Plaintiff's loan request or do any business with your, Plaintiff." (Compl., ¶ 7) (emphasis added). Clearly, plaintiff has not alleged that Mr. Flenniken refused to entertain his request for a loan due to racial motivations, but rather because he was related to Preston Byrd. Plaintiff's allegations go on to make it even more evident Mr. Flenniken's refusal was not racially motivated:

> That your, Plaintiff began to explain that his business requests were totally separate [sic] from Preston, then [Mr. Flenniken] responded by stating any money that your, Plaintiff may get would Be gotten for turn over to Preston and that he had no more to discuss....

(Compl., p. 4, para. 8). Thus, plaintiff complains he did not receive a loan from defendants because of a concern that he, as a relative of Preston Byrd, would divert loan proceeds to his son. Plaintiff's ECOA claim fails as a matter of law because any factual allegation which would satisfy the ECOA's material element of discrimination is absent.

D. Plaintiff's Title VI claim fails due to the lack of any

intentional discrimination.
Title VI prohibits discrimination in programs receiving federal financial assistance. Title
VI provides:

> No person in the United States shall, on the ground of race, color, or national origin, be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

In order to state a claim for damages under Title VI, a plaintiff must allege that "the entity involved is engaging in racial discrimination." Grimes v. Superior Home Health Care of Middle Tenn., 929 F. Supp. 1088, 1092 (M.D. Tenn. 1996). In this case, plaintiff has alleged that defendants engaged in racial discrimination by refusing to entertain his request for business loans. However, plaintiff's conclusory allegations of racial discrimination are not sufficient to support a Title VI claim.

To avoid summary judgment on a Title VI claim, "a plaintiff must create a genuine issue of material fact that the defendant intended to discriminate on the basis of race." Buchanan v. City of Bolivar, Tenn., 99 F.ed 1352, 1356 (6th Cir. 1996). To establish a genuine issue of material fact that Mr. Flenniken intended to discriminate on the basis of race, plaintiff must demonstrate that any decision not to entertain his loan request "was motivated by race and that his race was a determining factor in the exclusion." Id. "In other words, proof of discriminatory intent is critical." Id. (citing Guardians Ass'n v. Civil Service Comm'n, 463

U.S. 582 (1983)). It follows that where the decision maker is motivated by a factor other than the excluded party's race, there can be no intentional discrimination." Id. (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993)).

A plaintiff may prove discrimination in two ways. See Smith v. Chrysler Corp., 155 F. 3d 799, 805 (6th Cir. 1998). "The first is by putting forward direct evidence that the defendant had a discriminatory motive in carrying out its...decision." Id. (citing Robinson v. Runyon, 149 F .3d 507, 512 – 14 (6th Cir. 1998)). The second method is through utilization of the indirect McDonnell Douglas burden shifting framework.

Plaintiff here relies upon the direct evidence approach in attempting to prove intentional discrimination. As explained above, plaintiff alleges in both his initial complaint and Amended Complaint that Mr. Flenniken refused to entertain his loan request because of his relationship to Preston Byrd. Plaintiff further refined this allegation in his Amended Complaint by referring to definitions of words such as "Negro", "Colored", "Black", "Related", "Ancestry" and "Race", and attempting to draw a correlation between his relationship to his son and his race. Plaintiff contends that refusing his loan request because of his relation to Preston Byrd is an act of racial discrimination. With all due respect, it is unreasonable and illogical to make the conclusion plaintiff urges. Even when considering plaintiff's allegation in a light most favorable to him, it remains impossible to characterize the statement that one does not want to enter into a loan transaction with an applicant because of the applicant's relation to his son as a racially discriminatory statement.

To the extent plaintiff abandons the direct evidence approach and attempts to prove discrimination under the

indirect evidence approach, is claim would nonetheless continue to fail. "Under the indirect evidence method, the [plaintiff] must first establish a prima facie case of discrimination." Smith, 155 F .3d at 805. In order to establish a prima facie case of discrimination in this case, the plaintiff must show: 1) that he is a member of a protected class; 2) that he was qualified for a loan; 3) that he suffered an adverse decision; and 4) that similarly situated non – protected loan seekers were treated more favorably. See generally Monette v. Electronic Data Systems Corp., 90 F .3d 1173, 1179 (6th Cir. 1996); Talley v. Bravo Pitino Rest., Lid., 61 F. 3d 1241 (6th Cir. 1995). If a plaintiff is able to establish a prima facie case of discrimination, the burden of production shift to the defendant "to assert a Legitimate, non-discriminatory justification for its action." Monette, 90 F. 3d at 1179. Once the defendant offers a legitimate, non – discriminatory reason, the burden shifts once again to the plaintiff to prove that the proffered explanation of the defendant's actions is a pretext for discrimination. Id.

Here plaintiff has not, and cannot, establish a prima facie of discrimination. As set forth in Mr. Flenniken's affidavit, plaintiff did not meet SCC lending guidelines. Just as significantly, plaintiff cannot demonstrate that similarly situated non – protected loan applicants were treated favorably in light of the fact that at least half of the loans approved by SC in the Memphis area have been to minority – owned businesses. However, even if plaintiff could establish a prima facie case. Mr. Flenniken's affidavit also sets forth legitimate, non – discriminatory reasons for the loan refusal, namely, the types of business for which plaintiff sought loans and his concerns regarding plaintiff's relationship to Preston Byrd.

E. There are no state law claims alleged in the amended Complaint which provide a remedy to Plaintiff.

1. Plaintiff references state statutes inapplicable to case.

In addition to the federal claim discussed above, plaintiff's Amended Complaint alleges his action is also brought pursuant to Tenn. Code Ann. §§ 48 – 58 – 507. However, any claim which plaintiff attempts to assert under these statutes should be dismissed as they relate to corporate indemnification of officers an directors and provide no remedy to plaintiff herein.

Tennessee Code Ann. § 48 – 58 – 503 provides:

> Unless limited by its charter, a corporation shall indemnify a director who is wholly successful, on the merits or otherwise, or who is immune from suit under the provisions of § 48 – 58 – 601, in the defense of any proceeding to which the director was a party because the director is or was a director of the corporation against reasonable expenses incurred by the director in connection with the proceeding.

Tennessee Code Ann. § 48 – 58 – 507 provides:

> Unless a corporation's charter provides otherwise:
> (1) An officer of the corporation who is not a director is entitled to mandatory indemnification under § 48 – 58 – 503, and is entitled to apply for court – ordered indemnification under § 48 – 58 –

> 505 in each case, to the same extent as a director;
> (2) The corporation may indemnify and advance expenses under this part to an officer, employee, or agent of the corporation who is not a director to the same extent as to a director; and
> (3) A corporation may also indemnify and advance expenses to an officer, employee, or agent who is not a director to the extent, consistent with public policy, that may be provided by its charter, bylaws, general or specific action Of its board of directors, or contract.

While the above provisions may provide a cause of action to director or officer of a corporation for indemnification, they are clearly inapplicable to the present suit.

2. Plaintiff has elected an exclusive federal remedy.

To the extent plaintiff's Amended Complaint may sufficiently set forth any other claim for relief under state law, such claim must be dismissed because plaintiff has elected to pursue an exclusive federal remedy. Plaintiff clearly relies upon the ECOA as a basis for relief, and as a remedy for defendants' alleged discriminatory conduct in refusing his loan request. Section 1691d of the ECOA provides in part:

> Where the same act or omission constitutes a violation of this subchapter and of applicable State law, a person aggrieved by such conduct may bring a legal action to recover monetary damages Either under this subchapter or under

such State law, *but not both.*

15 U.S.C. § 1691d(e) (emphasis added). Therefore, any state law cause of action which plaintiff may have asserted based on his claim of discrimination should be dismissed because he has elected to seek relief for such conduct under the ECOA.

IV. CONCLUSION

In light of the foregoing, defendants request this Court grant summary judgment against plaintiff in their favor.

Respectfully submitted,

/s/ John Starnes
JOHN STARNES (TN NO. 21012)

Attorney or Travis Flenniken,
Southeast Community Capital
and Technology 2020

OF COUNSEL:

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
165 Madison Avenue
2000 First Tennessee Building
Memphis, Tennessee 38103
901 – 526 - 2000

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

TYRONE A. BYRD	) **No. 03 – 2490 - BA**
	)
V.	)
	)
TRAVIS FLENNIKEN, SOUTH -	)
EAST COMMUNITY CAPITAL	)
AND TECHNOLOGY 2020	)

AFFIDAVIT OF CLINT GWIN

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

COMES NOW the affiant, being first duly sworn, and deposes and states that he is competent to testify to the matters set forth herein based on his personal knowledge and belief:

1. My name is Clint Gwin, and I am currently employed as the president of Southeast Community Capital ("SCC").
2. SCC is a not for profit Tennessee Corporation and wholly owned lending and investment subsidiary of Technology 2020. SCC provides loans and investments to small minority and female – owned business, and to businesses in various low – income areas throughout Tennessee that do not have access to traditional financing options.
3. SCC administered or managed the following business loan or guaranty funds as of March 2003:

a. United States Small Business Administration Microloan Program ("SBA Microloan")

SCC is an approved SBA Microloan intermediary. Under the SBA Microloan Program, the SBA makes loan funds available to qualified non – profit organizations, such as SCC, which in turn act as intermediary lenders. The intermediaries use these funds to make loans of up to $35,000 to new and existing small businesses. SCC has borrowed $1 million From the SBA under this program to relend to small businesses in Tennessee, and parts of Georgia and Alabama. The Microloan funds SCC borrows from the SBA to relend to small businesses are not guaranteed by the SBA, and SCC is obligated to repay these amounts to the SBA. The SBA allows SCC to independently establish its own creditworthiness and lending guidelines with respect to its lending, and the SBA ~~is~~ at no time involved in SCC's loan – making decision process.

b. United States Department of Agriculture Intermediary Relending Program ("TRP").

The USDA Rural Development Office provides loans to prospective small business borrowers by making funds available to non – profit intermediaries, such as SCC, which in turn loan money to companies in rural and impoverished areas. SCC makes loans to start – up and early stage companies in six counties in East Tennessee under this program. These loan funds are not available in the Memphis area. Under the IRP, the USDA loans funds to SCC to relend, and SCC is obligated to repay these amounts to the USDA. SCC is required to make

the IRP loans in a 75/25 mix of Federal and private funds. In other words, 25% of the loan amount for IRP Loans consists of funds SCC borrows from private lending institutions. The USDA allows SCC to independently establish its own creditworthiness and lending guidelines with respect to its IRP lending, and does not require that SCC provide any loans.

c. SCC Revolving Loan Fund.

SCC created the Revolving Loan Fund using investments of $650,000 from local private financial institutions and $150,000 from the Community Development Financial Institution Fund ("CDFI Fund") for a total of $800,000. The CDFI Fund was created to expand the availability of credit and financial services in distressed urban and rural communities. The fund was authorized by the Riegle Community Development and Regulatory Improvement Act of 1994. The private financial institutions which contributed to the Revolving Loan Fund typically receive Community Reinvestment Act credit. SCC establishes and utilizes its own lending guidelines with respect to loans under this program.

d. Memphis Business Opportunity Fund ("MBOF").

The MBOF was created through a partnership between the Memphis Community Development Partnership and SCC. The Memphis Community Development Partnership consists of a partnership between the Memphis Housing and Community Development Authority, Union Planters Bank, First Tennessee Bank, National Bank of Commerce and The Federal Home Loan Bank of Cincinnati. SCC is engaged as an inde-

pendent contractor to manage the MBOF. The MBOF consists of a $1 million grant from the Memphis Housing and Community Development Authority and investments totaling $1.35 million from Union Planters Bank, First Tennessee Bank, National Bank of Commerce and The Federal Home Loan Bank of Cincinnati. While all of the funds invested by the banks are available for lending by SCC, only $797,000 of the Memphis Housing and Community Development Authority grant can be loaned, with the remaining amount retained as a loan loss reserve. SCC makes loans from the MBOF utilizing its own credit – worthiness and lending guidelines, which were subject to approval by an investment committee comprising representatives from each of the parties in the Memphis Community Development Partnership.

e. Memphis Contractors Assistance.

SCC makes loans to Memphis area contractors under the Memphis Contractors Assistance program. This program is funded through the MBOF, and is operated under the same SCC guidelines utilized for MBOF lending.

f. Chattanooga Opportunity Fund.

The City of Chattanooga has contracted with SCC to provide management and investment advisory services to the city with respect to a $1.5 million loan fund created from a city contribution. Loans from this fund are not available to the Memphis area. SCC utilizes its own lending guidelines in making decisions regarding loans from this fund.

g. Nashville Opportunity Fund

The Nashville Opportunity Fund is based on a management agreement between SCC and The Metropolitan Development and Housing Agency (" MDHA"). This fund is comprised of $450,000 of investments from private financial institutions and a $250,000 grant from MDHA. This loan fund was created to promote access to capital for small businesses in the Nashville/Davidson County area. Loans from this fund are not available in the Memphis area. The management agreement allows SCC to adopt its own lending policies.

h. Center for Entrepreneurial Growth Commercialization Fund ("CEG Fund").

The CEG Fund consists of $400,000.00 donated to Technology 2020 by UT – Battelle, the managers of the Department of Energy laboratory at Oak Ridge, Tennessee. Technology 2020 transferred these funds to SCC to administer. The loan fund is for companies commercializing technology from the Oak Ridge National Laboratory. The loans are only available to companies participating in the Center for Entrepreneurial Growth Program in Oak Ridge, Tennessee.

i. Southeast Capital Partners, LP f/k/a TennesSeed Fund I, LP.
SCC is the manager of Southeast Capital Partners, a private limited partnership which provides equity venture capital funds to technology – based, early stage, private companies. The fund consists of contributions from private entities (including TTDC), as well as a contri-

bution from The University of Tennessee.

j. Telecommunications Assistance Program ("TAP").

TAP is a Technology 2020 contract administered by SCC. TAP does not make business loans, but rather provides loan guaranties to small businesses in the telecommunications industry. TAP was created by Tennessee and funded with monies derived from a BellSouth overcharge of ?Tennessee customers. Because this fund provides loan guaranties only, it relies upon the lending guidelines of whichever financial institution has provided the applicant with the underlying loan.

4. SCC earns fees or receives operating grants from its management of loan and guaranty funds. Union Planters, National Bank of Commerce, First Tennessee Bank and the Federal Home Loan Bank of Cincinnati each provide SCC with a $25,000.00 grant per year. The City of Memphis pays SCC $25,000.00 per year, plus provides office space to SCC at a nominal rent. The City of Chattanooga pays $50,000.00 plus 2.5% of the Chattanooga Opportunity Fund balance to SCC for managing the fund.

5. Although Travis Flenniken is an employee of Technology 2020, he has been assigned to serve as the Loan Fund Manager for SCC's Memphis office.

Further the affiant sayeth not.

/s/ Clint Gwin
CLINT GWIN

SWORN TO AND SUBSCRIBED before me this 19 day of Jan, 2004.

/s/ Sandra J. Posey
Notary Public

My Commission Expires:
2/14/05

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

TYRONE A. BYRD	)	
V.	)	**No.03–2490 BA**
TRAVIS FLENNIKEN, SOUTH-EAST COMMUNITY CAPITAL AND TECHNOLOGY 2020	)	

AFFIDAVIT OF DAVID SNIDER

STATE OF TENNESSEE)
COUNTY OF KNOX)

COMES NOW the affiant, being first duly sworn, and deposes and states that he is competent to testify to the matters set forth herein based on his personal knowledge and belief:

1. My name is David Snider, and I am the chief financial officer of technology 2020.

2. Technology 2020 is a not for profit organization initiated as part of a regional economic development strategy designed to lessen the dependence of the East Tennessee region on government spending and to create a stronger private sector driven technology industry.

3. Technology 2020 formed Southeast Community Capital ("SCC") as a separate, wholly – owned subsidiary for the purpose of performing Technology 2020's lending operations. To that end, Technology 2020

Technology 2020 assigned or transferred responsibility for administering loan programs to SCC.

4. Technology 2020 was under contract with the Tennessee Department of Economic and Community Development to provide day to day management of the Tennessee Technology Development Corporation ("TTDC") from July 1, 2002 through January 15, 2004. TTDC is a non profit entity which was created by the Tennessee legislature to foster technology efforts throughout Tennessee. TTDC does not provide any business loans or guaranties.

5. With the exception of one loan fund available only in Hamilton County, Tennessee, at no times relevant to this lawsuit did Technology 2020 serve as an administrator or manager of any loan or guaranty funds, and, more specifically, did not offer any financial products to consumers in the Memphis area.

6. Technology 2020 has no offices located in the Memphis area.

Further the affiant sayeth not.

/ s / David Snider
DAVID SNIDER

SWORN TO AND SUBCRIBED before me this 28th day of January, 2004.

/ s / Linder R. Nash
Notary Public

My Commission Expires:
August 25, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISON

TYRONE A. BYRD	)	
	)	
V.	)	**No. 03 – 2490 - BA**
	)	
TRAVIS FLENNIKEN, SOUTH – EAST COMMUNITY CAPITAL AND TECHNOLOGY 2020	)	

AFFIDAVIT OF TRAVIS FLENNIKEN

STATE OF TENNESSEE)
COUNTY OF SHELBY)

COMES NOW the affiant, being first duly sworn, and deposes and states that he is competent to testify to the matters set forth herein based on his personal knowledge and belief:

1. My name is Travis Flenniken, and I have been employed as the Loan Fund Manager for Southeast Community Capital ("SCC") in Memphis, Tennessee at all times relevant to this lawsuit.

2. On March 12, 2003, I met with Tyrone Byrd prior to him completing one of our loan applications in order to get an idea as to his specific needs. Mr. Byrd stated that he was seeking a loan for a start – up restaurant business. When I informed Mr. Byrd that SCC did not make loans to restaurants, he immediately changed his purpose for seeking a loan and stated that he wanted a loan for his bail – bond business. I then informed Mr. Byrd that SCC did not make loans to re – lenders, and that a bail–bond business would be considered a re-lender.

3. At some point while Mr. Byrd and I were discussing the tow business loans he wanted, Preston Byrd came into the room, and Mr. Byrd introduced him as his son. On February 7, 2003, I had met with Preston Byrd regarding a loan for his business, before ever meeting Tyrone Byrd. On February 27, 2003, during the due diligence phase for Preston Byrd's business loan application. I discovered that he was under a federal indictment for wire fraud in connection with his business located in Memphis. In early March 2003, I contacted Preston Byrd and informed him that his request for a business loan was being denied by SCC.

4. After Preston Byrd arrived at my meeting with Tyrone Byrd, I became concerned that Mr. Byrd could be seeking a loan for his son's benefit, due to the fact that less than two weeks had passed since Preston Byrd's loan request had been denied, and that Mr. Byrd did not seem to have a specific business in mind.

5. When Mr. Byrd continued to talk about his two businesses after Preston Byrd's arrival, I again informed Mr. Byrd that SCC did not lend to restaurants or re–lenders, and that, due to Preston Byrd's participation in the meeting, I was concerned that Mr. Byrd was seeking a loan for his son. At that time, Mr. Byrd became angry and hostile towards me, and claimed that I was discriminating against him. Due to the high level of emotions and the claims of discrimination, I decided it would be best to conclude the meeting with Mr. Byrd and his son. I told Mr. Byrd that the meeting was over, but that he was welcome to take a loan application with him. To my knowledge, Mr. Byrd refused to take a loan application at that time, and again refused to accept and complete a loan application

when he was contacted shortly thereafter.

6. As of December 2003, SCC had made loans to 14 Memphis area business, 7 of which were African – American owned.

7. I did not inform Mr. Byrd that SCC did not make loans to restaurants and re – lenders because of his race, but because SCC lending policy generally does not allow for such loans. In fact, some of the marketing information SCC provides to the public regarding its loans lists restaurants as one of a few typed of loans that generally cannot be made

Further the affiant sayeth not.

/ s / Travis Flenniken
TRAVIS FLENNIKEN

SWORN TO AND SUBSCRIBED before me this 13 day of January 20, 2004.

/ s / Jacqueline Brown
Notary Public

My Commission Expires:
11 – 28 - 2005

U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
50 Vantage Way, Suite 201
Nashville, Tennessee 37228 - 1500

October 1, 2003

Via Facsimile: (901) 465 - 9534

Mr. Tyrone A. Byrd
A Alpha Bail Bond Agency
105 Kay Drive
Somerville, Tennessee 38068

Re: Technology 2020 & Southeast Community Capital

Dear Mr. Byrd:

This is in response to your request for information with respect to SBA loan programs that the above – named firms have been authorized to administer in Tennessee and the dates of such authorization.

As we have discussed, Southeast Community Capital Corporation (SCCC) is a approved SBA microloan intermediary. I am sending with this letter a copy of the page in our resource guide with information about this program. The service area given for SCCC is not up – to – date, as its area is now statewide.

Technology 2020 was authorize to receive a loan under this program on August 4, 1999, and that loan was subsequently assumed by SCCC. SCCC (then known as Technology 2020 Finance Corporation, Inc.) was authorized to receive a loan under the program on

February 9, 2001. These loans constitute all the funds made available by the SBA to SCCC for Tennessee.

Sincerely,

/ s / Richard L. Cummings
Richard L. Cummings
District Counsel

THE FEDERAL GOVERNMENT IS AN EQUAL OPPORTUNITY EMPLOYER

SOUTHEAST
COMMUNITY CAPITAL
1020 Commerce Park Drive, Suite L5, Oak Ridge, Tennessee 37830
Phone (865) 220 – 2025 – Facsimile (865) 220 - 2024

FACT SHEET

Mission: Southeast Community Capital (SCC) delivers financial products and development services to start – up and early – stage small businesses in communities in Tennessee and southern Appalachia that do not have access to traditional financing. SCC's goal is to create employment for low – income area residents through investments in these businesses. SCC is certified as a Community Development Financial institution (CDFI) and a Community Development Entity (CDE) by the U.S. Department of treasury. Working in conjunction with other community, regional, state, and federal partners, SC offers technical assistance for enhancing business planning, marketing, management, financial management, and entrepreneurial skills to these small business owners.

History: SCC was created in December 1999 as part of a statewide effort to increase access to capital for small businesses in Tennessee. SCC also is the managing entity for the TennesSeed Fund 1, a $30 million venture capital fund, which has applied for a Small Business Investment Company (SBIC) license from the SBA. Through a partnership with Kentucky Highlands Investment Corporation, SCC formed a conditionally approved New Markets Venture Capital Company (NMVCC), the Southern Appalachian Fund, which includes the states of Kentucky and Tennessee and the

Appalachian counties of Alabama, Georgia, and Mississippi. SCC has headquarters in Oak Ridge and offices in Chattanooga and Nashville with plans to open another branch in Memphis during the last quarter of 2002.

Products and Services:

Financial Products

Lending Programs
* SBA Micro Loan Fund
* USDA Intermediary Relending Program
* SCC Revolving Loan Fund
* Community Impact Loan Fund
* Chattanooga Opportunity Fund
* Nashville Opportunity Fund
* Nashville MDHA Fund
* Center for Entrepreneurial Growth (CEG) Fund
* Telecommunications Assistance Program (TAP)

* Equity Programs
* TennesSeed Fund 1
* The Southern Appalachian Fund

Developmental Services

Technical assistance for small businesses
Including, but not limited to:
* Organization
* Business planning
* Strategic planning
* Financial management

* Feasibility studies
* Production
* Management assistance
* Business turnarounds

Don Welty
President
865 – 220 – 2025
welty@sccapital.org

Grady Vanderhoofven
Vice President, Equity
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Ralph Woodard
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Clint Gwin
Ass't. Fund Mgr.
615 – 253 - 1950
gwin@sccapital.org

CORPORATE FORM AR 4403
WARRANTY DEED

THIS INDENTURE, made and entered into this 28th day of July 1988 by and between

MEMPHS PUBLISHING COMPANY,

A corporation organized and existing under and by virtue of the laws of the State of Delaware party of the first part, and CITY MEMPHIS, TENNESSEE, acting by and through its Division of Housing an Community Development, party of the second part.

WITNESSETH: That for and in consideration of Ten Dollars (10.00), cash in hand paid, and other good and valuable consideration, the receipt of all of the second part the following described real estate, situated and being in the City of Memphis County of Shelby State of Tennessee:

For legal Description of property see Exhibit "A" attached hereto and made a part hereof.

Being part of the same property conveyed to Grantor herein by Warranty Deed recorded as Instrument Number K6 – 9472, in the Register's Office of Shelby County, Tennessee.

TO HAVE AND TO HOLD the aforesaid real estate together with all the appurtenance and hereditaments thereunto belonging or in any wise appertaining unto the said party of the second part, its heirs, or successsors an assign in for simple forever.

This said party of the first part does hereby covenant with the said party of the second part that it is lawfully seized in for of the aforedescribed real estate; that it has a good right to sell an convey the same that the same is unencumbered, EXCEPT EASEMENT of record in Book 1527, Page 138; Book 1527, Page 140;

Book 1499, Page 355; Book 1532, Page 52; Book 2114, Page 332 and under Register's Number J8 – 5351; Conditions and provisions in Warranty Deed recorded under Register's Number K6 – 9472, all in the Register's Office of Shelby County, Tennessee,
and that the title and quiet possession thereto it will warrant and forever defend against the lawful claims of all persons.

Whenever the word "party" is used herein, it shall mean "parties" if there are more than one person referred to and whenever pronouns occur herein, they shall be construe according to their proper gender and number according to the contract of this instrument.

IN WITNESS WHEREOF, party of the first part has caused this instrument to be executed by and through its duly authorized officers the day and year first above written.

ATTEST: **MEMPHIS PUBLISHING CO:**

_____ **By /s/ Robert E. Schnelle**
Secretary **Robert E. Schnelle**
Controller

.....

STATE OF TENNESSEE, COUNTY OF SHELBY

Before that the undersigned, a Notary Public of the State and County aforesaid personally appeared Robert E. Schnelle with whom I am personally acquainted, for proved to me on the basis of satisfactory evidence) and who upon saith acknowledge himself to be the controller (or other officer authorized to execute the instrument of MEMPHIS PUBLISHING COMPANY the within named bargainer as corporation, and that he as

such controller.

WITNESS my hand and Official Seal at office this 28th day of July 1988.

My commission expires: March 1, 1992

/s/ William A. Carson, II
William A. Carson, II
Notary Public

(FOR RECORDING DATA ONLY)

****

Property address 555 Beale
Mail tax bills to: (Person or Agency responsible for payment of taxes)
Governmental Authority - None

This instrument prepared by:
Barbara Brown, Attorney
Mid – South Title Insurance Corp.
State tax ____ $ - 0 -
Register's fee ____
Recording fee 6.00
Total $ 6.00
T.O. 288333

Mid-South Title Ins. Corp.

I, or we, hereby swear or affirm that, to the best of affiant's knowledge, information, and belief, the actual consideration for this transfer or value of the property transferred, whichever is greater, is $445,000.00, which amount is equal to or greater than the amount which the property transfered, would command at a fair and voluntary sale.

/s/ Bradford Fontana
Bradford Fontana
Affiant

Subscribed and sworn to
Before me this 8-30-1988

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

TYRONE A. BYRD

V. **No. 03 – 2490 BA**

TRAVIS FLENNIKEN, SOUTH – EAST COMMUNITY CAPITAL AND TECHNOLOGY 2020 **JUNE 29, 2004**

MEMORANDUM IN SUPPORT OF MOTION OF PLAINTIFF TO DENY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW your Plaintiff, Tyrone A. Byrd, pro se and hereto submit this Memorandum In Support Of Plaintiff's Motion To Deny Defendants' Motion For Summary Judgment And Plaintiff's Motion For Summary Judgment and respectfully state the following:

I. INTRODUCTION

On June 2, 2003, your Plaintiff, Tyrone A. Byrd, pro se, filed a civil complaint, along with several interrogatories, request for production of documents and request for admissions, in the Thirtieth Judicial District Circuit Courts Of Tennessee At Memphis; all to be answered by each of the above named Defendants individually.

The original complaint, with all discovery request, was moved, by counsel for the Defendants, to this United

States District Court For The Western District Of Tennessee Western Division, on July 1, 2003.

After several motions being filed by all parties, your Plaintiff, on October 6, 2003 filed an amended complaint in pursuant to 42 USCA § 1983 (1091), Substantive Due Process, 15 USCA § 1691(A)(1), Racial Discrimination, 42 USCA § 2000d, Title VI of the 1964 Civil Rights Act, TCA 48 – 58 – 503 and TCA 48 – 58 – 507.

II. FACTUAL BACKGROUND

The Defendants, by way of counsel, have described Defendant SCC, as being not for profit statius providing loans and investments to small minority and female owned businesses, in low – income areas throughout Tennessee and SCC being wholly owned by Defendant Technology 2020; all assumed true. They have described Defendant Technology 2020 also a not for profit and a short summary of it's purpose. Therefore being Defendant Travis Flenniken is employed by Defendant Technology 2020 and that Defendant Technology 2020 ownes Defendant SCC, then Defendant Travis Flenniken is also directly employed by both Defendants Technology 2020 and SCC in which makes both Defendants Technology 2020 and SCC jointly responsible and liable for Defendant Travis Flenniken's actions in relations to his job assignment activities. Further being Defendant Travis Flenniken is employed by Defendants Technology 2020, which ownes Defendant SCC wholly, then both Defendants Technology 2020 an SCC jointly and directly provide business loans and have office in the Memphis, Tennessee area; all summarized from paragraph one of

the Defendants' Factual Background section.

Your Plaintiff's actions do stem from a visit to Defendants Technology 2020 an SCC Memphis office, meeting with both said Defendants employee, Defendant Travis Flenniken in seeking an expansion loan for your Plaintiff's bail bond existing business and a start up loan for a proposed restaurant. In your Plaintiff's attempt to apply for said loans, Defendant Travis Flenniken did racial discriminate against Plaintiff by denying your Plaintiff the right to apply for said loans in stating a racial reason of your Plaintiff's son Preston Byrd and your Plaintiff being related giving him the authority to deny your Plaintiff the right to apply for loans that are composed of tax payers dollars and administered by them; both Defendants Technology 2020 and SCC are supported by local governmental and federal funds. Being so, their employee's racial discrimination actions placed them all in violations under ECOA, 15 USCA § 1691 and Title VI of the 1964 Civil Rights Act.

Your Plaintiff further states that there is established a prima facie case in this matter being your plaintiff is (1) a Black Male American citizen member of a monority race, of these Unite States of America, which is of a protected class. (2) Your Plaintiff did attempt to apply for credit with the Defendants, (3) Your Plaintiff being self employed in the bail bond business since November 1974, being taught and experience in food service and restaurant management, being a property owner in both Shelby an Fayette County, Tennessee, having several persons employed and contracted under your Plaintiff's leadership and management throughout West Tennessee, being of excellent moral charater and credit worthiness; all quail-

fies your Plaintiff the right to have been approved for the credit so sought from the Defendants. (4) Your Plaintiff was not only denied the extension of credit despite qualifications, but was, without justifiable authority an reason, denied, by the Defendants the right to even apply for said credit with the Defendants; all plainly and without controversy do establish a prima facie case of credit discrimination under ECOA.

The Defendants, by way of counsel have previously, in this case, filed a motion to dismiss your Plaintiff's complaint in pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. This section of the rule states:

> "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Although your Plaintiff has been denied the authority to discovery in this case, this Honorable Court on March 2, 2004 has issued an Order Granting In Part And Denying In Part Defendants' Motion To Dismiss; in said order the court had stated as following:

> "The court finds that the plaintiff has sufficiently alleged a violation of the ECOA on the basis of racial credit discrimination to survive the rather low threshold applicable to a motion to dismiss."

Being the Defendants Rule 12(b)(6) motion and their motion for summary judgment are treated the same and that this Honorable Court has already ordered favorable in part your Plaintiff's claim. Under ECOA, then with all considerations the court should deny the Defendants' Motion For Summary Judgment as moot.

In regards to the 1983 Due process issue, this Court has issued an order dismissing your Plaintiff's due processing claim in the Court's March 2, 2004 order, but in this court's April 7, 2004 Order Denying Plaintiff's Motion For Stay Of Proceeding To Enforce A Judgment this court states as following in considering your Plaintiff § 1983 due processing claim:

> "Upon disposition of this case, either by trial or otherwise, the plaintiff is free to appeal the court's finding to the Sixth Circuit."

Finally the Defendants' motion for summary judgment is similar to motion to reconsider the Defendant's Rule 12(1)(b) motion to dismiss that was previously filed and ordered granting in part and denied in part. Citing from this Court's April 7, 2004 Order Denying Plaintiff's Motion For Stay Of Proceeding To Enforce Judgment this court states the following:

> "Although motion to reconsider are not ill – founded stepchildren of the federal court's procedural arsenal, they are extraordinary in nature and, because they run contrary to notions of finality and repose, should be discouraged. To be sure, a court can always take a second

> look at a prior decision; but it need not and should not do so in the vast majority of instances, especially where such motions merely or re – hash the initial issues. It is not the function of a motion to reconsider either to renew arguments already considered and rejected by a court or to proffer a new legal theory or new evidence to support a prior argument when the legal theory or argument could, with due diligence, have been discovered and offered during the initial consideration of the issue. Where party views the law in a light contrary to that of this Court, its proper recourse is not by way of a motion for reconsideration but appeal to the Sixth Circuit."

This Honorable Court should apply the same ruling as cited above to the Defendants' Motion For Summary Judgment being it is simple a motion for consideration.

II. LOCAL RULE 7.2(D)(2) DESIGNATION OF FACTS

1. In paragraph (1) under the Local Rule 7.2(D)(2) section in the Defendants' Memorandum Supporting their Motion Summary Judgment, state that, Defendants SCC and Technology 2020 are private, non – profit corporations. On page (1) paragraph (2) of both Defendants' Technology 2020 and SCC charter, it is stated that the Defendants' are both public benefit corporations; the state of them being private are state-

ments of untruth to the court. (SEE ATTACHED EXHIBIT "A" AND "B")

2. In paragraph (2) under this Local Rule 7.2(D)(2) section, in the Defendants' Memorandum Supporting Motion For Summary Judgment, it is stated that Defendant Travis Flenniken is an employee of Defendant Technology 2020. Paragraph (2) in the affidavit of Clint Gwin states SCC is a not for profit Tennessee corporation and wholly owned lending and investment subsidiary of Technology 2020. Such statement sustains the fact that being the Defendant Technology 2020 wholly own Defendant SC and that Defendant Travis Flenniken is employed by Technology 2020 and SCC. Such being so sustain the fact that both Defendants Technology 2020 and SCC are individually and jointly responsible and liable for the discriminatory action alleged in this case by your Plaintiff.

4. There is nothing in the entire record that support or prove Defendant Travis Flenniken's statement, in paragraph (2) of his affidavit, of Defendant SC not lending to restaurants or re – lenders. Bail bond businesses are not re – lenders, but sureties for court appearances of Defendants being released from jail by bonds. The fact of the matter concerning Defendant SC lending; In the affidavit of Clint Gwin paragraph (3) (d) states:

> "The Memphis business Opportunity Fund "MBOF was created through a partnership between the Memphis Community Development Partnership and SCC. The Memphis Community Development Partnership consists of a partnership between the Memphis Housing

> and Community Development Authority, Union Planters Bank, First Tennessee Bank, National Bank Commerce and The Federal Home Loan Bank of Cincinnati. SCC is engaged as an independent contractor to manage the MBOF."

All of the said banks stated as part of the MBOF make loans to bail bond and restaurant businesses, which gives SCC as a partner the authority to make loans. Such being sustain the fact that the Defendant Travis Flenniken sworn statements in paragraph (2) of his affidavit are untrue and without any supporting authentic document.

5. In addressing paragraph 9 in the Defendants' Local Rule 7.2 (D) (2) section, the Defendant Travis Flenniken state his concern by Counsel, as to your Plaintiff loan request may have been for the benefit of Preston Byrd and that Preston was under a federal indictment. Preston has never had any ownership in your Plaintiff's business nor have your Plaintiff had any ownership in Preston's business. Your Plaintiff was seeking two loans totaling $1.1 Million dollars. Is there any logic in your Plaintiff seeking such an amount to turnover to Preston as was stated by Defendant Travis Flenniken at the March 12, 2003 interview. **(SEE ATTACHED EXHIBITS "I" and "J")** Your Plaintiff was not under any such indictment nor having any business ties with Preston business. Such statement from Defendant Travis Flenniken is total non – business comparison. Preston's attached affidavit **(EXHIBIT "K") (para 3)** state his reason being at the Renaissance Center on March 12, 2003.

6. Your Plaintiff was recommended, by Memphis City Councilman Joe Brown, to go to the Renaissance Center seeking the loan so sought on March 12, 2003. Considering such recommendation, why would your Plaintiff refuse to accept or complete a loan application. Also your Plaintiff's attached loan proposal sustain your Plaintiff was seriously seeking loans for self.

7. In addressing para (11), their policies set no authorization under defendant SCC guidelines that gives Defendant Travis Flenniken the right to turn away an applicant from applying for a loan from SCC. Therefore Defendant Travis Flenniken was outside his job authority in his assumptions and decision to not allow your Plaintiff to apply for said loans. Defendant Travis Flenniken statement that he would not allow your Plaintiff to apply for said loans because of your Plaintiff and Preston being related was and is a racial reason as defined in Webster's New World college Dictionary Third Edition Copyright 1978 Through 1997, **(see exhibit "H" ATTACHED)** "related is defined as the same family," "race is defined as same ancestry; family," "family is defined as related by ancestry," and "ancestry is defined as family decent." Preston and your Plaintiff are blood family, racial and ancestry related. One must be aware of his 5th amendment right to remain silence rather making statements that cannot be retracted such as the Defendant Travis Flenniken has done.

8. In addressing paragraph (12) of how many loans made by Defendant SCC as of December 2003 and to how many minority - owned businesses receiving such loans as so stated by the Defendants; there is no authentic documented proofs submitted in the entire record that support such allegations.

III LAW AND ARGUMENT

A. The standard for denying the Defendants Motion For Summary Judgment in this case and granting your Plaintiff's Motion For Summary Judgment is plainly satisfied because there is a genuine issue as to material fact that exist in this case and such issue has been well stated by your Plaintiff with supporting document evidence to grant such judgment in favor of your Plaintiff and denying the Defendants' Motion.

Your plaintiff has revealed in the record that there is no genuine issue as to any material fact that the Defendants' are entitled to summary judgment as a matter of law. See Johnson v. Hills & Dales General Hosp., 40 F .3d 837, 837 839 (6th Cir. 1994). The Defendants have present no evidence to support their defense only pleadings and affidavits. See Ashbrook v. Block, 917 F .2d 918, 921 (6th Cir. 1990). As in Celotex Corp. v. Catrett 477 U.S. 317, 325 (1986) your Plaintiff moving for summary judgment has met its burden by showing that there is no absence of evidence to support your Plaintiff's pleadings. Your plaintiff has made a showing sufficient to establish the existence of an element essential to your Plaintiff's case, and on which your Plaintiff will bear the burden of proof at trial. See Celotex, 477 U.S. at 322.

The Defendants Motion For Summary Judgment should Be denied; your Plaintiff is entitled to summary judg –

ment in your Plaintiff's favor on the claim of discrimination under 15 U.S.C. § 1691 Equal Credit Opportunity Act and under Title VI of the 1964 Civil Rights Act, because this Court has previously sustain a judgment in favor of your Plaintiff under ECOA. The Defendants' request under § 1983 have also been previously decided on by this Court's March 22, 2004 order.

B. As to your Plaintiff's EOCA claim of racial discrimination, your Plaintiff state that the Defendant Travis Flenniken using a racial reference in his denying your Plaintiff the right to apply for tax payer's dollars, which all composes the defendant SCC loan program; quoted a racial reason that his denial of any such application was because of your Plaintiff and son Preston are related. Both your Plaintiff and Preston are related, therefore to state such a racial discrimination under such loan program and is material elements necessary to sustain a recovery under some viable legal theory.

> SEE SCEID V. FANNY CANDY SHOPS, INC. 859 F2d 434 at 436 "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable theory."

. Your Plaintiff also state that the Defendant Travis Flenniken racial statement of Preston and your Plaintiff being related is of a factual allegation that is true and is supported by the direct witness of Preston and your Plaintiff whereas Defendant Travis Flenniken has no witness in support of any denial of such racial statement made by him and his negative actions toward

your Plaintiff. (SEE ATTACHED AFFIDAVIT EXHIBIT para 7)

> SEE CAR CARRIER, INC et. al. v. FORD MOTOR COMPANY 745 F 2D 1101 (1984)
> "In considering propriety of dismissal for failure to state a claim, Court of Appeals was required to assume that factual allegations of the complaint were true."

Such racial reason actions did not extend Defendant Travis Flenniken the authority to deny your Plaintiff the right to apply for a loan from SCC being SCC is administrating loan programs by receiving Federal Financial assistance as state in the affidavit of Clint Gwinn para (3) (a). **(SEE ATTACHED AFFIDAVIT)** Such racial statement of Preston and your Plaintiff being related is a direct inferential allegation in respect to both as being the same race.

> SEE GRIMES v. SUPERIOR HOME HEALTH CARE OF MIDDLE TN. 929 F. Supp. 1088 (M.D. TENN. 1996)

Section 601 of Title VI

> No person in the United States shall, on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Fed. financial. assistance.

Federal financial assistance.

Your Plaintiff further state that the Defendant Travis Flenniken did in desperation, possibility and intentionally discriminate against your Plaintiff which such is inferred from the evidence. SEE TEAMSTERS, 431 U.S. at 335. Defendant Travis Flenniken in his stated reason of Preston and your Plaintiff being related and such reason being racial, directly sustain the avoiding of summary judgment in favor of the Defendants, but therefore sustain such summary judgment as being in favor of your Plaintiff because the Defendant SCC loan program is Federally Funded.

> SEE BUCHANAN v. City of Bolivar, TN 99 F .3d 1352 (6th Cir. 1996)
>
> To avoid summary judgment on a claim under civil rights statue dealing with exclusion from participation in Federally funded program, a plaintiff must create a genuine issue of material fact that the defendant intend to discriminate on the basis of race.

Your Plaintiff state that all evidence hereto and alleged in your Plaintiff's complaint sustain proof of discriminatory intent by the Defendant Travis Flenniken with support of both Defendants SCC and Technology 2020; that such action of discriminatory effect is enough to establish a violation of Title VI of the 1964 Civil Right Act. SEE GUARDIANS ASSOCIATION et. al. v. CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK et al. 463 U.S. 582.

There is nothing in the record that imply or allege your Plaintiff as unqualified or of some ill moral status as to disqualify from the right to have applied for a loan under Defendant SCC nor Technology 2020 guidelines; therefore in considering allegations made in your Plaintiff's complaint the only factor that motivated the Defendant Travis Flenniken decision, not to allow your Plaintiff to apply for a loan for SCC was in his racial statement of your Plaintiff being related to Preston and his discriminatory action in which such is intentional racial discrimination. SEE HAZEN PAPER CO. v. BIGGINS 507 U.S. 604, 609 (1993).

The evidence in this case as presented by your Plaintiff is most proponent than that of the Defendants.

> SEE ROBINSON v. BUYON 149 F. 3d at 508 (6th Cir 1998) In reviewing a district court's exclusion of evidence on the grounds of relevance and its balancing of the potentially unfair prejudicial impact of evidence against its probative value, Court of Appeals must view the evidence in the light most favorable to its proponent giving the evidence its maximum reasonable prejudicial value.

Your Plaintiff has established a prima facie case for violation of Equal Credit Opportunity Act and has shown the following:

> SEE MATTHEWS v. NEW CENTURY MORTG. CORP. 185 F. Supp. 2d 874 (S.D. Ohio 2002)

(1) that they are members of a protected class; (2) that they attempted to apply for credit from the defendant; (3) that they were qualified for the credit; and (4) the Defendant lender refused to transact business with the plaintiffs despite their qualifications

IV CONCLUSION

In considering all of the fore goings and attachment in support, your Plaintiff prays that a hearing be set and that Defendants' motion, being previously ruled on, should be denied and rendered moot and that your Plaintiff's Motion For Summary Judgment be granted in favor of your Plaintiff being there is a genuine issue of material fact that exist in your Plaintiff's case.

Respectfully submitted,

/ s / Tyrone A. Byrd
TYRONE A. BYRD pro se
10206 Herons Landing Cv
Lakeland, Tennessee 38002
901 – 237 - 4846
901 – 465 - 6878

IN THE UNITED STATED DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

TYRONE A. BYRD

v.

TRAVIS FLENNIKEN, SOUTH - EAST COMMUNITY CAPITAL AND TECHNOLOGY 2020

AFFIDAVIT OF PRESTON E. BYRD

STATE OF TENNESSEE)
COUNTY OF SHELBY)

Comes now the affiant, being first duly affirm and deposes and states that he is competent to testify to the matters set forth herein based on his personal knowledge and belief.

1. My name is Preston E. Byrd; I am the son of Tyrone A. Byrd.

2. On March 12, 2003, I went to the Renaissance Center located at 555 Beale Avenue, Memphis, Tennessee, with expectation of meeting with Ms. Beverly goings, the Director at the Center.

3.Although I knew, from prior discussion, that my dad was going to the Center seeking loans for his Bail Bond Business and a restaurant proposal called Kings Bar – B – Que, my purpose for going to the Center was seeking an opportunity to discuss with Ms Goings in regards to my wife Donette Byrd being authorized to apply

for a loan for our business.

4. When I arrived at the Center, I asked the receptionist if Tyrone A. Byrd was there; shed answered yes and allowed me to go back to the area where he was.

5. I was thinking my dad was meeting with Ms. Goings, but to my surprise, when I walked into the area, he was meeting with Travis Flenniken whom I knew from my prior meeting him.

6. My dad asked Mr. Flenniken if he knew me, Mr. Flenniken acknowledge yes and ask me to have a seat, he then stated he was wondering if my dad Tyrone Byrd and me were related prior to my entering the area where they were.

7. Almost immediately after I was seated, Mr. Flenniken's attitude changed, he then stated to my dad that because my dad and me were related to each other that he could not and would not except a loan request from my dad or do any business with him.

8. Mr. Flenniken's insulting attitude and response was shocking to me and my dad.

9. My dad began to explain to Mr. Flenniken that our business connections were totally separate, but Mr. Flenniken stated that any money my dad would get, would be turned over by dad to me and that he did not want to discuss it any further.

10. As my dad began to further explain, Mr. Flenniken get up from the table that we were seated around and state he had made his decision and that Ms. Goings would back him: he then walked out of the area leaving my dad and me seated at the table.

11. The both, my dad and me being shocked at Mr. Flenniken's attitude and insulting actions, got up and walked back to the reception area where the, I believe

security guard and receptionist were.

12. My dad began to express to the security guard and the receptionist of our being so bodily insulted; the receptionist stated she was sorry for what had happen and apologized to us.

13. My dad stated to the receptionist that she owed us no apology, but that Mr. Flenniken did, then the both of us left the Center.

14. My dad later called me that day and stated he was meeting with Counseling Joe Brown concerning what had happen at the Center.

Further the affiant sayeth not.

/s/ Preston E. Byrd
Preston E. Byrd

DECLARED TO AND SUBSCRIBED before me this 28th day of June 2004.

/s/ James Hester
James Hester
NOTARY PUBLIC

01 – 28 – 2007
MY COMMISSION EXPIRES:

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

TYRONE A. BYRD,

v. **No. 03 – 2490 B**

TRAVIS FLENNIKEN, SOUTH-EAST COMMUNITY CAPITAL AND TECHNOLOGY 2020 **September 16, 2004**

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND DISMISSING CASE WITH PREJUDICE

INTRODUCTION AND PROCEDURAL HISTORY

The pro se Plaintiff, Tyrone A. Byrd, initiated this lawsuit pursuant to 42 U.S.C. § 1983 alleging violations of the Fourteenth Amendment Due Process Clause, Title VI of the Civil Rights Act of 1964, the Equal Credit Opportunity Act codified at 15 U.S.C. § 1691 ("ECOA"), and Tennessee Code Annotated §§ 48 –58 – 503 and -507 in connection with his failure to obtain a loan from the Defendants. On February 3, 2004, the Defendants, Travis Flenniken, Southeast Community Capital Corporation and Technology 2020, moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. In an order entered March 22, 2004, the Court Dismissed the § 1983 Fourteenth Amendment claim as well as the Plaintiff's claims

under Tennessee statutory law. As the Plaintiff had failed to respond to the Defendants' motion for summary judgment, this Court, on June 15, 2004, ordered Byrd to show cause why the Rule 56 motion should not be granted. On June 29, 2004, the Plaintiff responded by way of his own motion for summary judgment, to which the Defendants have responded. Thus, the matter is now ripe for disposition. The Court will limit its inquiry to the only issues remaining before it - the Plaintiff's claims under Title VI and the ECOA.

FACTS

The Plaintiff alleged in his complaint as follows:

1. That on March 10, 2003, your, Plaintiff, Tyrone A. Byrd called the Renaissance Center, located at 555 Beal Avenue, Memphis, Tennessee, and talked to Ms. Beverly Going and was set an appointment to meet with her on March 12, 2003, 9:00 a.m. at the 555 Beale Avenue address.

2. That on March 12, 2003 your, Plaintiff Tyrone A. Byrd went to the Renaissance Center, 555 Beale Avenue, Memphis, Tennessee, signed in at the front desk requesting to see Ms. Goings.

3. That after waiting for about ten (10) to fifteen (15) minutes, Defendant, Travis Flennigan came out and greeted your, Plaintiff, stating he was to talk to your Plaintiff instead [sic] of Ms. Goings due to her being in a business meeting.

4. That your, Plaintiff proceeded to a section, following Defendant, Travis Flennigan where the both of them were seated at a table.

5. That your, Plaintiff, Tyrone A. Byrd began to explain the purpose of being there in which was seeking

two separate [sic] loans, one to expand [sic] your, Plaintiff's present business operation, which is a Bail Bond business and two, to start up a Bar – B – Que Restaurant business in the City of Memphis, Tennessee.

6. That shortly after your, Plaintiff beginning [sic] to explain his request, your, Plaintiff's son Preston Byrd came around after being acknowledged by both your Plaintiff and Defendant, Travis Flennigan.

7. That immediately after Preston Byrd was seated the Defendant, Travis Flennigan's attitude changed, he became very disrespectful and stated that due to your, Plaintiff being related to Preston that he could not and would not except [sic] your, Plaintiff's loan request or do any business with your, Plaintiff.

8. That your, Plaintiff began to explain that his business requests were totally separate [sic] from Preston, then the Defendant Travis Flennigan responded [sic] by stating any money that your, Plaintiff may get would be gotten for turn over to Preston and that he had no more to discuss concerning your, Plaintiff's requests and refused to allow your, Plaintiff to apply for any loan.

9. That your, Plaintiff attempted to explain again and was very rudely turned off whereas Defendant Travis Flennigan stated he had made his decision not to entertain your, Plaintiff's loan requests, he got up from his seat and stated Ms. Going would back him and then he hurriedly walked away leaving Preston and your, Plaintiff seated at the table.

(Compl. For Attached, Damages and Equitable Relief at (unnumbered) pp. 2-3).

STANDARD OF REVIEW

> Rule 56 states in pertinent part that a ...judgment ...shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56 (c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); Canderm Pharmacal, Ltd. V. Elder Pharmaceuticals, Inc., 862 F. 2d 597, 601 (6th Cir. 1988). In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). When the motion is supported by documentary proof such as depositions and affidavits, the nonmoving party may not rest on her pleadings but, rather, must present some "specific facts showing that there is a genuine issue for trial". Celotex, 477 U.S. at 324, 106 S. Ct. at 2553. "{ T] he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact". Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 – 48, 106 S. Ct. 2505, 2510, 91 L.Ed. 2d 202 (1986) (emphasis in original). "Material" facts which

are defined by substantive law and are necessary to apply the law. A dispute over trivial facts which are not necessary in order to apply the substantive law does not prevent the granting of a motion for summary judgment. Id. at 248, 106 S. Ct. at 2510. Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322, 106 S. Ct. at 2552. In this Circuit, "this requires the nonmoving party to put up or shut up [on] the critical issues of [This] asserted causes of action." Lord v. Saratoga Capital, Inc., 920 F. Supp. 840, 847 (W.D. Tenn. 1995) (citing Street v. J. C. Bradford & Co., 886 F. 2d 1472, 1478 (6th Cir. 1989)). The judge may not make credibility determinations or weigh the evidence." Adams v. Metiva, 31 F. 3d 375, 379 (6th Cir. 1994). With these principles in mind, the Court now turns to the individual claims before it.

ANALYSIS OF THE PARTIES'S CLAIMS

A. Title VI,

Title VI, codified at 42 U.S.C. § 2000d, provides that [n] o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The statute prohibits only intentional discrimination. Alexander v. Sandoval, 532 U.S. 275, 280, 121 S.Ct. 1511, 1516, 149 L. Ed. 2d 517 (2001). "[T] o avoid

summary judgment on a claim under § 2000d, a plaintiff must create a genuine issue of material fact that the defendant intended to discriminate on the basis of race." Buchanan v. City of Bolivar, Tenn., 99 F. 3d 1352, 1356 (6th Cir. 1996). Therefore, in order to establish a genuine issue of material fact that the Defendants intentionally discriminated against Byrd on the basis of his race, the Plaintiff must demonstrate that his failure to obtain a loan was "motivated b race and that his race was a determining factor" in the lender's action. See id. "In other words, proof of discriminatory intent is critical. It follows that where the decision maker is motivated by a factor other than the excluded party's race, there can be no intentional discrimination." Id. (internal citation omitted).

In support of their motion, the Defendants have submitted the affidavit of Defendant Flenniken, in which he asserted as follows:

3. At some point while Mr. Byrd and I were discussing the two business loans he wanted, Preston Byrd came into the room, and Mr. Byrd introduced him as his son. On February 7, 2003, I had met with Preston Byrd regarding a loan for his business, before ever meeting Tyrone Byrd. On February 27, 2003, during the due diligence phase of Preston Byrd's business loan application, I discovered that he was under a federal indictment for wire fraud in connection with his business located in Memphis. In early March 2003, I contacted Preston Byrd and informed him that his request for a business loan was being denied by SCC.

4. After Preston Byrd arrived at my meeting with Tyrone Byrd, I became concerned that Mr. Byrd could be seeking a loan for his son's benefit, due to the fact

that less two weeks had passed since Preston Byrd's loan request had been denied, and that Mr. Byrd did not seem to have a specific business in mind.

(Defs.' Mot. For sum. J., Ex. C, Aff. Of Travis Flenniken at ¶¶ 3 – 4.)

In response to the Defendants' motion and in support of his request for summary judgment, the Plaintiff offers the affidavit of his son Preston, who averred that

2. On March 12, 2003, I went to the Renessiance [sic] Center located at 555 Beale Avenue, Memphis, Tennessee, with expectation [sic] of meeting with Ms. Beverly Goings, the Director at the Center.

3. Although I knew, from prior discussion, that my dad was going to the Center seeking loans for his Bail Bond Business and a restaurant proposal called Kings Bar – B – Que, my purpose for going to the Center was seeking an opportunity to discuss with Ms. Goings in regards to my wife Donette Byrd being authorized to apply for a loan for our business.

4. When I arrived at the Center, I asked the receptionist if Tyrone A. Byrd was there; she answered yes and allowed me to go back to the area where he was.

5. I was thinking my dad was meeting with Ms. Goings, but to my surprise, when I walked into the area, he was meeting with Travis Flenniken whom I knew from my prior meeting [sic] him.

6. My dad asked Mr. Flenniken if he knew me, Mr. Flenniken acknowledged yes and ask me to have a seat, he then stated he was wondering if my dad Tyrone Byrd and me were related prior to my entering the area where they were.

7. Almost immediately after I was seated, Mr. Flenniken's attitude changed, he then stated to my dad that because my dad and me were related to each other that he could not and would not except [sic] a loan request from my dad or do any business with him.

8. Mr. Flenniken's insulting attitude and response was shocking to me and my dad.

9. My dad began to explain, to Mr. Flenniken that our business connections were totally separate, but Mr. Flenniken stated that any money my dad would get, would be turned over by my dad to me and that he did not want to discuss it any further.

10. As my dad began to further explain, Mr. Flenniken got up from the table that we were seated around an stated he had made his decision and that Ms. Goings would back him; he then walked out of the area leaving my dad and me seated at the table.

(Mem. In Supp. Of Mot. Of Pl. to Deny Defs.' Mot. For Summ. J. and Pl.'s Mot. For Summ. J., Ex. K, Aff. Of Preston E. Byrd. At ¶¶ 2 – 10.)

Based on the Court's review of the evidence, both parties are in agreement that nothing discriminatory occurred during the Plaintiff's meeting with Flenniken prior to Preston Byrd's arrival. Byrd argues in his brief that "[I]n your Plaintiff's attempt to apply for said loans, Defendant Travis Flennikenn did racial [sic] discriminate against Plaintiff by denying [sic] your Plaintiff the right to apply for said loans in stating a racial reason of your Plaintiff's son Preston Byrd and your Plaintiff being related giving him the authority to deny your Plaintiff the right to apply for loans..." (Mem. in Supp. Of Mot. Of Pl. to Deny Defs.' Mot. for

Summ. J. at pp. 2 – 3.) In addition, the Plaintiff does not dispute that his was under federal indictment.

Viewing the evidence in favor of the Plaintiff, the Court finds as a matter of law that no discrimination on the basis of race occurred. Although Tyrone Byrd is black, he does not allege any discriminatory action when he and Flenniken were discussing the loan alone. It is also clear to the Court that Flenniken's objection to making the loan was based on the status of the Plaintiff's son as on charged with a federal fraud crime and not race. The Plaintiff's protestations to the effect that he did not in fact intend to pass the money on to his son if the loan was obtained in immaterial, as it does not go to the elements of the alleged Title VI violation. Moreover, the Plaintiff's assertions that a lender's qualms concerning a family member of a prospective borrower automatically makes any reluctance "racial" solely because the "family" may be associated with 'ancestry" and therefore implicates race is patently absurd and unsupportable. As the Plaintiff has utterly failed to show racial motivation on the part of Flenniken, which he must, the Defendants' motion for summary judgment is GRANTED as to the Title VI claim. See Buchanan, 99 F. 3d at 1356.

B. ECOA CLAIM.[1]

The ECOA prohibits discrimination by a creditor "against any applicant, with respect to any credit transaction...on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)," 15 U.S.C. § 1691(a)(1). "The purpose of the ECOA is to eradicate credit discrimination waged against women, es-

pecially married women whom creditors traditionally refused to consider for individual credit." May v. Buckeye Rural Elec. Co – op. Inc., 277 F. 3d 873, 876 (6th Cir. 2002) (citation omitted). Given the similar purposes in enacting ECOA and Title VII of the Civil Rights Act, the analytical framework of federal employment discrimination claims under Title VII is to be used to consider allegations of credit discrimination as well. Id.

In Title VII cases, a plaintiff may withstand summary judgment either by presenting direct evidence of discrimination or by presenting circumstantial evidence utilizing the evidentiary framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 6688 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67

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[1]The Plaintiff appears to have misunderstood the Court's March 2, 2004 ruling concerning his ECOA claim. The Court's opinion dealt with the Defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) requires only a showing that the complaint contains "either direct or inferential allegations with respect to all the material elements of the claim to sustain recovery under some viable legal theory." Wittstock v. Mark A. Van Sile, Inc., 330 F. 3d 899, 902 (6th Cir. 2003). While proof as to the complaint's allegations is not required to survive a motion to dismiss, evidence must be produced in order to avoid summary judgment sought under Rule 56, See Celotex, 477 U.S. at 324, 106 S. Ct. at 2553. Indeed, the Court specifically advised the pro se Plaintiff in its previous order the "[t}he court finds that the plaintiff has sufficiently alleged a violation of the ECOA on the basis of credit discrimination to survive the rather low threshold applicable to a motion to dismiss. Of course, whether he will be able to prove his claims remains to be seen." (Order Granting in Part and Denying

in Part Defs.' Mot. To Dismiss at p. 6.) Consequently, the Defendants' request for summary judgment as to the ECOA claim at this stage is not, as Byrd insists, moot.

L. Ed. 2d 207 (1981), from which a jury could draw an inference of discriminatory motive. See Seay v. Tennessee Valley Auth., 339 F. 3d 454, 463 (6th Cir. 2003). As the Court has concluded herein that the Plaintiff has failed to come forth with direct evidence of discrimination, his claims must be considered under the McDonnell Douglas / Burdine paradigm.

Plaintiff may create an inference of discrimination by establishing a prima facie case, in which, under the ECOA. He must show that (1) he was a member of a protected class, (2) he applied for credit with the defendant, (3) he was qualified to receive the credit sought; and (4) he was denied the extension of credit despite his qualifications. Mays, 277 F. 3d at 867 – 77. Once the plaintiff has established a prima facie case of discrimination, the burden shifts to the credit institution to produce a legitimate, nondiscriminatory reason for its actions. Hood v. Midwest Sav. Bank, No. 02 – 3525, 2004 WL 771216, at *9 (6th Cir. Apr. 8, 2004). If the defendant carries its burden of production, the preponderance of the evidence raised by the plaintiff's prima facie case is rebutted. A plaintiff must then prove, by a preponderance of the evidence, that the lender's stated reasons for its action were a pretext for discrimination. See St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502, 518 – 19, 113 S. Ct. 2742, 2753 – 54, 125 L. Ed. 2d 407 (1993). A plaintiff may show pretext by presenting evidence that the defendant's stated reason had no basis in fact, did not actually motivate the deci-

sion or was not sufficient to motivate the employer's action. See Manzer v. Diamond Shamrock Chem. Co. 29 F. 3d 1078, 1084 (6th Cir. 1994), reh'g en banc denied (Sept. 2, 1994). The ultimate burden of persuasion remains at all times with the plaintiff. Burdine, 450 U.S. at 253, 101 S. Ct. at 1093.

In this case, even if the Court were willing to assume Byrd had established a prima facie case of credit discrimination under the ECOA, the Defendants have articulated a nondiscriminatory reason for their action - - that is, a concern Byrd actually wanted the loan for his son who had been refused funds because he was under federal indictment. As the Plaintiff has failed to show the stated reason had no basis in fact, did not actually motivate the decision or was not sufficient to motivate the action, his ECOA allegation cannot succeed.

CONCLUSION

Based on the foregoing, the Defendants' motion for summary judgment is GRANTED, the Plaintiff's motion for summary judgment is DENIED, and this lawsuit is DISMISSED with prejudice in its entirety. The Clerk is therefore directed to enter judgment in favor of the Defendants.

IT IS SO ORDERED this 16th day of September, 2004.

/ s / J.D.Breen
J. D. Breen
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

TYRONE A. BYRD

V. **No. 03 – 2490 - BA**

TRAVIS FLENNIKEN, SOUTH-EAST COMMUNITY CAPITAL AND TECHNOLOGY 2020 **SEPT. 22, 2004**

NOTICE OF APPEAL

Notice is hereby given that your Plaintiff, Tyrone A. Byrd, pro se, in the above named case, hereby appeal to the United States Court of Appeals for the Sixth Circuit from an order issued March 2, 2004 granting dismissal in part your Plaintiff's Amended Complaint, 42 USC § 1983 Fourteenth Amendment Due Process Clause claim, whereas the Court has issued an order on April 7, 2004 granting your Plaintiff, upon disposition of this case, either by trial or otherwise, the freedom to appeal the Court's March 2, 2004 finding to the Sixth Circuit. Your Plaintiff also hereby is appealing the final judgment in this case of all other matters issued in a September 16, 2004 order.

Respectfully submitted,

/ s / Tyrone A. Byrd
Tyrone A. Byrd, pro se

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

TYRONE A. BYRD

V. **Civil No. 03 – 2490 – B**

TRAVIS FLENNIKEN, SOUTH-EAST COMMUNITY CAPITAL AND TECHNOLOGY 2020 **SEPT. 22, 2004**

JUDGMENT IN CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been duly considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Order Granting Defendants' Motion for Summary Judgment, Denying Plaintiff's Motion for Summary Judgment, and Dismissing Case with Prejudice entered September 16, 2004, this case is hereby dismissed.

/ s / J. D. Breen
J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE

September 22, 2004
Date

By: / s / Robert R. DI Trolio
Robert R. DI Trolio
Clerk

By: / s / Judy Easley